88-76

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROCKER NATIONAL BANK,
CROCKER PROPERTIES, INC., and
PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether, under the Takings Clause of the Fifth Amendment, a city, in imposing a lump sum development fee as a condition of occupying new office buildings, may shift an inordinate share of the public cost of subsidizing mass transit fares for 45 years into the future to a limited and identifiable class of developers.

Whether, in determining under the Due Process Clause of the Fifth Amendment that notice was adequate to allow retroactive application of a development fee, a court may rely solely on what the city intended or understood by the language of the notice and not on what the developer would reasonably have understood the notice to mean.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Supreme Court of the State of California (App., *infra*, 1a-21a), dated March 17, 1988, is reported at 44 Cal. 3d 839, 750 P.2d 324. The decision of the Court of Appeal of the State of California, First Appellate District, Division Five (App., *infra*, 25a-55a), dated January 20, 1987, is reported at 199 Cal. App. 3d 1496. The first decision of the California Superior Court for the City and County of San Francisco (App., *infra*, 70a-105a), upholding the constitutionality of the ordi-

nance in question, dated January 4, 1985, is not reported. The second decision of the California Superior Court for the City and County of San Francisco (App., *infra*, 56a-69a), upholding the retroactive application of the ordinance in question, dated August 2, 1985, also is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of California was entered on March 17, 1988. The Notice of Appeal (App., *infra*, 134a-135a) was filed with the clerk of the Supreme Court of the State of California on May 24, 1988. On June 6, 1988, Justice O'Connor extended the time within which to docket the appeal up to and including July 15, 1988. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The San Francisco Transit Impact Development Fee ("TIDF") Ordinance (No. 224-84, codified at S.F. Admin. Code § 38.1) is reproduced in the Appendix. (App., *infra*, 106a-133a).

STATEMENT

Appellants, Crocker National Bank and Crocker Properties, Inc. ("Crocker") and Pacific Gateway Associates Joint Venture ("Pacific Gateway"), are developers of downtown office buildings in San Francisco. Appellants applied for permits for construction of new downtown office projects in 1979. Crocker obtained approval for its project on July 26, 1979 pursuant to City Planning Com-

mission Resolution No. 8332. Pacific Gateway's project was approved on September 20, 1979, pursuant to City Planning Commission Resolution No. 8378. Construction on the projects began soon after the permits were awarded.

About two years later, on May 5, 1981, the City and County of San Francisco (the "City") enacted the Transit Impact Development Fee Ordinance at issue here. That Ordinance, which became effective on June 5, 1981, imposed a $5 per square foot "development fee" on all new downtown office development. The fee amounts to almost $2.5 million in additional cost to each of the appellants for the office buildings that appellants had under construction at the time that the TIDF Ordinance was enacted.[1] Appellants have challenged the constitutionality of the TIDF Ordinance on the ground that it constitutes a "taking" of property without just compensation and on the ground that the retroactive application of the Ordinance to their property violates due process.

The Transit Impact Development Fee

The TIDF Ordinance has its origins in the enactment by California voters of Proposition 13, a 1978 amendment to the state constitution which limits the ability of local governments to assess property taxes and other special taxes. California Constitution, Article XIIIA. For many years prior to 1978, the City had financed the

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[1] Although appellants had been issued permits, the transit development fee is collected prior to "the issuance of a certificate of final completion and occupancy for new development in the downtown area." App., *infra*, 110a. At the effective date of the Ordinance, construction on appellants' properties was well under way but no certificate of occupancy had yet been issued. App., *infra*, 4a. While this litigation is pending, appellants, by agreement with the City, are making installment payments on the development fee into an escrow account and have occupied the buildings. See *id.* at 41, n.5.

deficit—the extent to which operating costs exceeded fare revenues and federal and state grant monies—in the San Francisco Municipal Railway public transit system ("MUNI") out of the City's general fund. Following Proposition 13, it was apparent that the newly-created limits on property tax revenues would undermine the City's ability to continue to fund the operating deficit. J.A., Exhibits 64, 67 & 68.[2]

City officials considered various potential sources of new revenue to finance the transit system. They considered creating a "special assessment district"[3] encompassing all properties, new and existing, in downtown San Francisco as a means of financing the MUNI. They also considered the enactment of a variety of special taxes to underwrite the transit system. App., *infra*, 64a; see J.A. Ex. 85, 86, 91 & 92. Eventually, however, such proposals were abandoned.[4]

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[2] All citations to the joint appendix ("J.A.") in this Jurisdictional Statement refer to the joint appendix filed in this matter before the California Court of Appeal.

[3] "A special assessment is 'a charge imposed on particular real property (within the special assessment district) for a local public improvement of direct benefit to that property.'" An assessment district may be formed by local legislative resolution, but affected parties must be afforded notice and an opportunity for a hearing and a majority of affected property owners protesting the proposed improvement may block the formation of the district. App., *infra*, 9a; see California Constitution, Article XVI, § 19.

[4] The City's political leaders apparently believed that a proposal for a "special assessment district" would be unable to obtain the support of a majority of property owners (or, in the alternative, a four-fifths majority override by the Board of Supervisors) necessary to its formation. Similarly, "special taxes" may be imposed only upon a two-thirds vote of the electorate. California Constitution, Article XIIIA, § 4. The Board of Supervisors also may have considered other, more direct, means of reducing the transit deficit, such as raising transit fares, but no such fare increases were enacted. In any case, it is clear that city leaders viewed the TIDF Ordinance as part of a "revenue package." See Trial Exhibit 502.

Instead, the City determined in early 1980 to impose a "development fee" on construction of new office buildings to ensure a source of necessary revenue for the transit system. In support of this novel exaction, the City made projections designed to justify a fee of $5 per square foot on new development. This figure purports to reflect the present value of projected *deficits* (the excess of operating expenses over fare revenues) that Muni would incur, over a 45 year period, in providing peak period transit service to the additional riders who would use the public transit system to commute to and from their jobs in the newly constructed buildings.[5] In effect, the fee shifts to private developers a large portion of the public "cost" of the City's policy decision to subsidize transit fares—a decision that the City could no longer afford to support through property taxes.

In this regard, the City's transit development fee is distinct from traditional land development exactions used to support capital improvements, such as roads, parks or sewers, which are directly tied to—and made necessary by—the land development in question. See generally Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5 (Winter 1987). Historically, local governments often required dedication of on-site property (*e.g.*, to create streets) as a condition of developing the property in question. *Id.* at 7.

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[5] The $5 per square foot figure was established by (1) estimating the marginal net cost (vehicle and operating costs not offset by fares) per passenger in one year; (2) multiplying the marginal net cost per passenger by the estimated average number of new passengers per square foot of office space in a year; and (3) extrapolating those costs for 45 years and applying a discount rate to obtain a current cost. App., *infra*, 97a-98a. The trial court concluded that there was a "debatable rational basis" for accepting this "snapshot" methodology as a calculation of actual future costs. *Id.* at 98a.

The form and scope of such development exactions have greatly expanded within recent years. Many communities have demanded financing of "off-site" capital improvements (*e.g.*, sewer lines) that were affected by the development; some even required cash payment to the community itself so that the community could undertake what it determined to be "necessary" improvements. See *id.* at 14. "What began as a means for preventing a subdivision from shifting to the municipality the responsibility for installing public improvements has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local government can no longer afford." *Id.* at 28; See also Babcock, *Foreword to Exactions: A Controversial New Source for Municipal Funds*, 50 Law & Contemp. Probs. 1 (Winter 1987).

Compared to the historically permissible development exaction, the TIDF is novel in many respects. The TIDF is designed to require new developers alone to provide revenue to support the deficit in an ongoing municipal service—not simply to contribute to the capital (*i.e.*, vehicle) expense that is directly attributable to the development in question. Indeed, the TIDF primarily recoups the projected deficit in the *operating expenses* of the transit system, not the cost of capital improvements. See App., *infra*, 117a-118a; J.A. Ex. 39 & 54.[6]

Moreover, the TIDF collects this operating subsidy "up front" on the basis of estimated costs and not as the costs are actually incurred. Most important, despite the City's admission that all downtown office buildings generate identical demands on the transit system, the City's transit development fee singles out a small and identifiable group of new developments to bear an inordinate share of the burden of funding the City's decision to sub-

[6] Under the terms of the TIDF Ordinance, all of the fees collected could be used for operating costs. See App., *infra,* 117a-118a.

sidize the municipal transit system for the benefit of all users of the system. See App., *infra*, 106a-123a.

The Decisions Below

1. Appellants' challenge to the validity of the TIDF Ordinance in the California Superior Court was consolidated for trial with an action brought by Russ Building Associates, which was representing the class of persons that owned property within the area to which the TIDF applied. After a bench trial, the court issued a decision which addressed all of the issues raised by the plaintiffs, except for the question of whether the Ordinance could be afforded a retroactive application.[7]

The court stated that the "ordinance will be upheld under the Police Power unless there is a complete absence of even a debatable rational basis for the legislative determination." App., *infra*, 75a. Thus, according to the court, the only federal constitutional question was whether the Ordinance was "reasonably related to a legitimate government objective." *Id.* at 77a. Because "adequate public transportation" was found to be a "legitimate governmental objective" and the TIDF was found to further that objective by providing funds to meet the "increased demand for peak-period transit facilities," the Ordinance was upheld. *Id.* at 78a.

The court specifically rejected the notion that the Ordinance impermissibly placed the burden of financ-

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[7] The TIDF Ordinance had been challenged on the grounds that, *inter alia*, it violated the Due Process Clause and the Equal Protection Clause, as well as the Takings Clause of the U.S. Constitution. The validity of the Ordinance also was challenged on various state law grounds.

This case properly is before this Court on appeal because "[a] local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. § 1257(2)," *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 591 (1962); and the courts below sustained the validity of the Ordinance against the direct constitutional challenge of appellants.

ing such a public cost on a discrete group of taxpayers. "No infirmity arises merely because the general public would share the benefit of the contributed resources or because the exaction creates facilities which will not directly benefit the development." Instead, the court reasoned that "[t]he resources need only be used to combat the general problem created by new development." *Id.* The court concluded that this determination—that the Ordinance rationally furthered a legitimate government interest—was sufficient to "dispose[] of Plaintiffs' taking clause challenge to the TIDF." *Id.* at 79a.

After upholding the Ordinance as "a valid exercise of local police power," the Superior Court issued a second opinion on August 2, 1985 (App., *infra*, 56a-69a) in which it addressed the issue of "whether the TIDF Ordinance may be applied retroactively to Pacific Gateway and Crocker, who obtained building permits prior to its adoption and who were in the course of construction at the time of its enactment." App., *infra*, 57a. The court, relying in part on *Welch* v. *Henry*, 305 U.S. 134 (1938), held that "retroactive application of economic charges" may result in a violation of due process. App., *infra*, 62a. The court found that "[w]hen Plaintiffs completed substantial construction and incurred substantial liabilities in reliance on the permits received at the time they chose to develop, they acquired a vested right to complete construction and use their buildings in accordance with the *terms* of those permits." *Id.* However, the court observed that the permits included certain "transit mitigation condition language," by which appellants agreed to participate "in a downtown assessment district, or 'similar, fair and appropriate mechanism.'" App., *infra*, 66a. The court found that, based on the transit mitigation language, appellants "could have reasonably anticipated" that they would be subject to an "assessment" and that an "assessment district" was sufficiently "similar" to the TIDF Ordinance to "allow retroactive application . . . without impairment of constitutional rights." App., *infra*, 63a.

In making this determination, the court looked to the "purpose expressed and implicit in the condition's language, history and background," *id.*, which, according to the court, demonstrated that "at the time Plaintiffs' Resolutions [adopting the language of the building permits] were passed, a variety of possible mechanisms were being considered, including a development fee." *Id.* at 65a. Thus, based largely on evidence as to the *City's* knowledge, the court found that the "TIDF Ordinance is consistent with the purpose implicit in the mitigation condition language and falls within the range of possible funding mechanisms contemplated by the parties." *Id.* at 68a.

2. On the direct constitutional challenge to the Ordinance, the California Court of Appeal affirmed, following the "rational basis" analysis undertaken by the trial court. With respect to the City's decision to place an inordinate share of the burden of the transit system's growing deficit on the owners of new development, the court held that such a decision bore a rational relationship to a "conceivable legitimate state purpose." App., *infra*, 34a. Thus, the appellate court simply held that "the trial court could properly conclude that" the TIDF was not "arbitrary or unreasonable and was not an unconstitutional taking of plaintiffs' property." *Id.* at 36a.[8]

With respect to the separate issue of whether the Ordinance could be applied retroactively to appellants, the court of appeal reversed, holding that the trial court had erred in relying on evidence of what the City planning commission was "considering" (App., *infra*, 41a) at the

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[8] Russ Building Associates noticed on appeal to this Court from the decision of the California Court of Appeal after it became clear that the California Supreme Court had granted review only on the due process "retroactivity" issue raised by appellants. The City filed a motion to dismiss Russ Building Associates' appeal for lack of jurisdiction on the ground that the notice of appeal was untimely. On October 19, 1987, this Court dismissed the appeal for want of jurisdiction. See 56 U.S.L.W. 3288 (October 20, 1987).

time the transit mitigation language was adopted. Instead, the court of appeal held that in the absence of any evidence that "this information was communicated to the [appellants]," the City planning commission's unspoken intent could not properly be considered in determining whether the appellants were provided with adequate notice. Focusing on the language of the permits and the information available to appellants, the court found that the permit language "did not reasonably place [appellants] on notice to expect this development fee" and hence, the "retroactive application of the [transit fee] [wa]s unconstitutional." App., *infra,* 43a. Thus, the court of appeal reversed the judgment as to appellants.

3. The City petitioned for review in the Supreme Court of the State of California on the issue of whether the retroactive application of the Ordinance to appellants' property violated their vested rights. Appellants responded by urging the Supreme Court to deny the petition or, in the alternative, to grant review on all of the issues disposed of by the court of appeal, including the "takings" issue. See Cal. Rules of Court 28(e)(5).[9] The

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[9] Although the California Supreme Court's order granting review in this case limited the questions under review to the issues relating to retroactive application of the Ordinance, appellants subsequently requested that the California Supreme Court add an additional question, pursuant to Cal. Rules of Court 29.2(b), to "consider whether the TIDF violates the takings clause of the United States Constitution, as interpreted in the United States Supreme Court's recent decision in *Nollan* v. *California Coastal Comm'n* . . . ." App., *infra,* 5a, n.6. The California Supreme Court denied the request. *Id.*

There is no question that the constitutional issue properly was preserved. Indeed, appellees stated to this Court in their motion to strike Crocker's response to the jurisdictional statement in No. 87-398 (*i.e.*, the Russ Building appeal, see *supra* n.7) that:

> if the California Supreme Court accepts the City's position on the so-called "retroactivity" issue which is now before it, Pacific Gateway and Crocker will be entitled to seek review in

California Supreme Court granted the City's petition on the issue of retroactive application of the Ordinance and reversed the judgment of the Court of Appeal on that issue, concluding that "the TIDF may be imposed [retroactively] on the [appellants'] projects without impairing the developers' vested rights." In so holding, the California Supreme Court placed substantial reliance on evidence of what the City's planning commission was considering at the time that the conditional language was added to the building permits. The court held that this evidence demonstrated that the City "intended the transit mitigation condition to include a range of funding devices broad enough to encompass the TIDF." App., *infra*, 14a.

Chief Justice Lucas dissented. With respect to the evidence which focused on the City planning commission's intent, he noted simply that "[t]he Commission's intent . . . is irrelevant to the issue of the adequacy of [appellants'] notice." App., *infra*, 20a. Putting aside the City's unilateral intent, Justice Lucas "disagree[d] with the majority that the TIDF, which applies only to new buildings and essentially demands from [appellants] the lion's share of the costs for the increased transit fee over the next 45 years, was contemplated by the ambiguous language of the permits." *Id.* Indeed, because " 'the entire downtown area is affected by the peak demand in ridership, it would be unreasonable to expect [appellants] to anticipate that only a few [new] office buildings would be covered by the funding mechanism.' " *Id.* at 21a (quoting Court of Appeal's conclusion). Appellants filed their notice of appeal from the judgment of the California Supreme Court on May 24, 1988.

> this Court of the federal constitutional questions which they have addressed in their "Response" . . . [T]hose parties [*i.e.*, Pacific Gateway and Crocker] properly raised the Taking Clause issue in the California Supreme Court. . . .

City and County of San Francisco's Motion to Strike Appellee's Response In Support of Appellant's Jurisdictional Statement at p. 4, n.3.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The application of San Francisco's Transit Impact Development Fee to appellants' property presents two substantial and novel constitutional issues involving a developing area of land use regulation and municipal finance. Although the use of monetary exactions or development fees as a hidden "taxing" mechanism is not without precedent, San Francisco's TIDF Ordinance "broke new ground" in its tenuous linkage of the development of downtown office space and the costs of operating the City's transit service many decades into the future.[10] A decision by this Court on the validity of this "development fee" will have significant implications because many other municipalities will certainly follow San Francisco's lead unless the path chosen by the City is declared unconstitutional. Thus, a decision after plenary consideration of the issues presented is necessary to resolve a recurring nationwide conflict between the constitutionally

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[10] Counsel for the City candidly has admitted that the Ordinance "breaks new ground" as an expansive use of development fees. See San Francisco Examiner, Jan. 22, 1987 at B1, col. 4. However, the City of San Francisco is not alone in its interest in passing along public costs, which in fairness should be borne by the public as a whole, to private parties in the guise of development fees. See Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 Law & Contemp. Probs. 51 (Winter 1987) ("One of the hottest issues in the land use arena is the expanding implementation of development exactions and impact fees"); see also Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, *id.* at 69; Siemon, *Who Bears the Cost?*, *id.* at 115.

Professor Babcock notes that "[e]very half decade or so, zoning comes forth with a hero, a *bette noire*, or an Armageddon of some sort. Five years ago, it was the consequences of taking and the Sherman Antitrust Act. Ten years ago, it was transfer development rights. Fifteen years ago, it was exclusionary zoning, and twenty years ago, it was landmarks. Today, it is exactions." Babcock, *Foreword to Exactions: A Controversial New Source for Municipal Funds*, 50 Law & Contemp. Probs. 1 (Winter 1987) (footnotes omitted).

protected property rights of landowners and the legitimate financial interests of municipal governments and to provide both groups with guidance on this issue of vital importance.

A. The Fifth Amendment Prohibits The Use Of A Development Fee To Finance Operating Costs Of A Public Transit System

1. The holdings of the courts below simply ignore the bedrock principle of the Fifth Amendment that "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325 (1893). No one disputes that, given the subsidized transit fares, the public transit system in San Francisco creates a public expense and that the City is acting rationally in attempting to generate revenues to fund that cost. But the question is whether the City, through the mechanism of the TIDF Ordinance, properly may "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). More specifically, the legal issue is whether the highly deferential rational basis test, applicable to substantive due process challenges, also governs Takings Clause cases so that the more specific language of the Takings Clause is rendered a redundancy.

The Takings Clause issue is posed starkly in this case because the TIDF was adopted as a response to limitations imposed by the electorate on the City's ability to tax the public generally to pay for public functions, such as a transit system. See *supra*, p. 4 & n.4. Without that limitation on the City's taxing authority, there can be little doubt that revenues generated from property taxes would have been used to pay the transit subsidy. However, because of the limitations on property taxes, the City has selected appellants to bear the burden the rest of the community refused to assume. This arbitrary and

harmful treatment of appellants' property rights is precisely what the Fifth Amendment was designed to prevent.

The parameters of the Takings Clause analysis to be applied in this case were set forth by Justice Brandeis, writing for this Court in *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405 (1935):

> [W]hen particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.

Id. at 429-430 (citations omitted). The principle that society cannot, consistent with the Fifth Amendment, force certain individuals to bear public costs remains a cornerstone of modern "takings" jurisprudence. See *Nollan* v. *California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.4 (1987); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980); *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 147-148 (1978) (Rehnquist, J., dissenting).[11]

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[11] Justice Scalia, in his dissent in *Pennell* v. *City of San Jose*, 108 S. Ct. 849, 863 (1988), suggested that the justification for this fundamental "takings" principle is not to prohibit government from transferring wealth. Rather, the "takings" problem arises only when the government focuses on a narrow class of persons in order to achieve such wealth transfers "with relative invisibility and thus relative immunity from normal democratic processes." *Id.* In other words, a regulation or tax which affected all property owners would be subject to the usual political constraints; a regulation or tax which affects only a narrow class of property owners is not.

2. The TIDF is a bald effort by a governmental entity to shift the substantial portion of a public burden to private parties. Under the TIDF Ordinance, the costs borne by appellants are those costs deemed by the City to be "necessary" to continue to *subsidize* transit fares over the next 45 years. Indeed, the "fee" is premised on a calculation which presumes that the City will continue to subsidize *all* MUNI riders—including those riders who work in buildings developed by appellants' competitors.[12] "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting). The arguments of appellees and the opinions of the courts below do not answer this fundamental objection to the TIDF Ordinance.

The *only* analysis of the takings issue by the state courts consists of conclusory statements that the "objective of providing adequate public transportation is a legitimate governmental objective" and that requiring a development fee is "reasonably related" to that objective. App., *infra*, 35a-36a. But the debatable rational basis analysis undertaken by those courts answers only the preliminary inquiry whether the government action in question serves a public purpose. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962). Once it is established that the assessment serves a legitimate public purpose, there still remains the separate and distinct question of whether the assessment in question is so

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Thus, the smaller class appropriately is protected by a constitutional restriction on the government's ability to shift public burdens to that private class.

[12] For this reason, the TIDF Ordinance is unlike the typical development fee which asks the developer to offset only those one-time capital costs which are directly attributable to the development. Such "user fees" may properly be assessed upon "particular property owners" because the fees assessed are based directly upon "benefits received by them." *Walters*, 294 U.S. at 430; see *supra*, p. 14.

"unduly oppressive upon individuals"—in its shifting of inordinate public burdens to private parties—that it should be held to constitute a taking. *Id.*

On the issue of the "shifting" of public burdens, the trial court specifically noted that it would not hold the TIDF Ordinance to be impermissible on the ground that the "general public would share the benefit of the contributed resources or because the exaction creates facilities which will not directly benefit the development." App., *infra*, 78a. The court of appeal also expressly recognized the burden-shifting aspects of the development fee. App., *infra*, 34a-35a. In light of this recognition that the TIDF Ordinance, in fact, shifts a substantial proportion of the "public" costs of mass transit growth to the relatively small class of individual new office developers, rejection of the takings claim through the application of a "debatable rationality" standard clearly was incorrect.[13]

In *Nollan*, decided last Term, this Court made clear that the required nexus between a government interest and a land use regulation, such as a "development fee," is not satisfied by a mere showing that the government action is "rational." To the contrary, the City was required to demonstrate that the development fees imposed were "substantially" related to the actual costs of appellants' development. See *Nollan*, 107 S. Ct. at 3146-3148. Here, no such showing was made or even attempted.

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[13] Assuming arguendo that the City simply could have "repealed" appellants' building permits because of the burden that the buildings would place on the transit system, it does not follow that the City therefore can "condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Nollan*, 107 S. Ct. at 3148. If the fee is not substantially related to the end to be served, but is instead "a forced contribution to general governmental revenues," then it constitutes a taking. See *Webb's Fabulous Pharmacies*, 449 U.S. at 163.

Appellants do not mean to suggest that every local government property assessment and user fee must be precisely tailored to "capture" exactly those benefits attributable to the property or activity being taxed. But this Court now has made clear that the level of scrutiny under the Takings Clause is significantly higher than that which would be appropriate in response to a due process or equal protection challenge. *Nollan*, 107 S. Ct. at 3147 & n.3. Thus, the decisions below that equate the takings analysis with a due process or equal protection "rational basis" standard for regulatory economic activities must be subjected to plenary review.

3. Nor could the City have sustained its burden of proving that the expenses to be paid through the TIDF Ordinance are substantially related to the developments in question. For example, in establishing the methodology for calculating the fee, the ordinance *assumes, inter alia*, that: (1) increased property taxes (from appellants' development) will not be used to reduce the transit system's operating deficit; (2) the City will continue to provide below-cost service at subsidized fares, with no improvement in its operating margin; (3) the City will not receive any state, federal or private operating or capital subsidies to offset its costs; (4) the calculation of "peak period" costs should not be offset by any off-peak revenues attributable to appellants' development; and (5) the calculation of costs should assume no increase in the level of crowding for the system as a whole or material decreases in the frequency of service. The assumptions are rendered even less realistic by the City's projection of these costs 45 years into the future, using a real rate of return of 1.7%. After the Board adopted the $5 per square foot fee, the consulting firm hired by the City to compute the fee acknowledged, in a classic understatement, that there are "significant uncertainties associated with many aspects of this analysis" of costs. Because of these uncertainties, the City's consultants conceded that a "reasonabl[e]" calculation could range from $0.51 to $15.59 per square foot. J.A. 69.

While a desire to subsidize transit fares, to avoid increases in the level of crowding on the transit system and to reserve other sources of revenue (including appellants' property taxes) for other purposes are legitimate governmental objectives, the costs incurred to pursue these objectives are not substantially related to the development of a new office building. *Cf. Nollan,* 107 S. Ct. at 3150. The City's calculation of the costs (in increased deficits in the transit system) of appellants' developments is, at best, a "guess" based upon (and limited by) the *multiple* governmental interests at stake. There is no substantial nexus between the transit impact development fee and the articulated purpose of capturing the actual "cost" of new development.[14]

The takings issues presented by the decisions of the state courts, which raise directly the question of the extent to which government can make a specific policy decision that requires additional funding and then impose the burden of that decision on a limited pool of contributors, is worthy of plenary consideration by this Court. The takings issue clearly is substantial, and it was decided by the courts below under a much too lenient "rational basis" standard of review. Moreover, in light of the expanded use of such "development fees" by municipal governments,[15] the need for guidance by this Court is apparent.

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[14] Moreover, it is questionable whether it is even appropriate to capture the costs of services—as opposed to true capital costs. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1121 (1964).

[15] The City already has enacted another office development fee intended to finance child care costs allegedly generated by downtown office development. See San Francisco Planning Code § 315. If the holding below is affirmed without opinion, there will be no apparent limit on the extent to which general revenues can be enhanced by development fees. Moreover, dismissal for lack of a substantial federal question would preclude lower courts from scru-

B. The Fifth Amendment Prohibits The Retroactive Application Of The Transit Development Fee Ordinance

It is a well established principle of due process that once a vested right has been acquired, a person cannot be deprived of that right without adequate notice that the interest is subject to termination or modification by the government. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).[16] The California Supreme Court agreed with appellants' contention that, as a matter of state law, "[appellants] had a vested right to complete the buildings and occupy them under the conditions contained in the [building] permits." App., *infra*, 6a, 74a.[17] Thus, unless the appellants' building permits provided adequate notice of the possible enactment of the TIDF Ordinance, "application of the later-enacted TIDF ordinance to [appellants] would impair their vested rights and violate due process." App., *infra*, 6a.

In support of its argument that the appellants had "notice" that their permits might be conditioned on a development fee such as the TIDF Ordinance, the City

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tinizing such fees, except under a rational basis standard. An increased demand for virtually any city service—from police and fire protection to social services and road construction—can be hypothetically linked to development. As long as the city can attach some "debatably rational" price tag to such services, developers can be required to pay for at least 45 years of such services "up front." Such a novel form of taxing the few for the benefit of the many should be permissible only after this Court has reviewed the takings issue on the basis of full briefing and argument.

[16] The *Mullane* holding recently was reaffirmed by this Court in *Tulsa Professional Collection Services, Inc.* v. *Pope*, 108 S. Ct. 1340, 1344 (1988) ("as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances").

[17] The California Supreme Court noted that "[appellants] had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the City enacted the TIDF ordinance." App., *infra*, 6a.

pointed to the language of the permits which provided, in relevant part:

> In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, [the developer] shall participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City.

App., *infra*, 3a.[18] The California Supreme Court accepted the City's contention that the TIDF "falls among the funding mechanisms contemplated by the resolutions." *Id.* at 6a. In so holding, the court specifically relied upon both the language[19] and "the history and background" of the relevant "condition" in the building permit for evidence of the *City's "intent"* or "understanding" of the meaning of the transit mitigation provision. By relying expressly upon "familiar principles of statutory construc-

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[18] The "notice" required to satisfy due process would not have placed an undue burden on the City. The City was only required to state that the property was subject to a "development fee" instead of using the term "assessment district," which refers to a completely different funding mechanism.

[19] Although the California Supreme Court held that the TIDF is a funding mechanism "similar" to a "downtown assessment district" and that therefore the TIDF was contemplated by the conditional language of the building permit, that state law holding is still subject to review by this Court under the Due Process Clause. Even if it were possible to construe the language to permit the tax, that does not answer the issue of whether the method chosen to place appellants on notice was the most reasonably calculated means of conveying the relevant information.

By analogy, even though the state court in *Mullane* presumably held that publication notice was valid and reasonable as a matter of state law, this Court still considered whether the notice was adequate under the United States Constitution. Thus, the California Supreme Court's interpretation of the meaning of the conditional language in the permit in no way precludes this Court from determining whether the language provided reasonable notice.

tion" to inform its analysis, the California Supreme Court made clear that its interpretation of the permit was designed to "ascertain the intent of the legislature . . . ." The court made no attempt to discern how appellants actually interpreted that language or even what a reasonable person might have understood by the language. App., *infra*, 16a.

The analysis of the court below, which was limited to the City's intent in adopting the transit mechanism language, is wholly irrelevant to the notice issue under the Due Process Clause. As this Court has made clear, due process in this context requires the government to provide notice "of such nature as reasonably to convey the required information . . . ." *Mullane*, 339 U.S. at 314. The question is not whether the language of the notice provision can be read to reflect the City's current interpretation of it. Rather, the appropriate issue is whether the language chosen was reasonably calculated to place appellants on notice that their vested right could be modified subsequently by the City. This Court, in similar circumstances, has always inquired whether the notice was effective, or likely to be reasonably effective, in conveying the required information in a way that could be understood. See *Greene* v. *Lindsey*, 456 U.S. 444 (1982); *Memphis Light, Gas and Water Div.* v. *Craft*, 436 U.S. 1 (1978); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983). The California Supreme Court simply focused on the wrong party of the transaction in its 'interpretation" of the transit mitigation language.[20]

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[20] Indeed, the California Supreme Court's premise that the "notice" should be treated as a legislative enactment flies in the face of its own holdings that governmental actions such as the issuance of building permits "affecting the relatively few" are "adjudicatory in nature" and not legislative acts. See *Horn* v. *County of Ventura*, 24 Cal. 3d 605, 614, 596 P.2d 1134, 1138 (1979); *San Diego Bldg. Contractors Ass'n* v. *City Council*, 13 Cal. 3d 205, 529 P.2d 570 (1974).

By adopting a due process standard that focuses primarily on what the City understood or intended by its own words, the California Supreme Court has turned the due process "notice" requirement on its head. Such a rule effectively adopts the fiction, rejected by this Court, that the public has constructive knowledge of all possible developments that might occur in the law. See, *e.g.*, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971). It also permitted the City to avoid its obligation, imposed by this Court's notice decisions, to explain why the City failed to make its intention clearer and thereby provide more explicit notice. *Walker* v. *City of Hutchinson*, 352 U.S. 112, 116 (1956). Thus, the constitutional error inherent in the California Supreme Court's decision on the due process question is substantial and warrants plenary review by this Court.

* * * * *

This is not an appropriate case for the Court to "wait and see" how the issue develops in subsequent cases. Development impact fees are not going to disappear. As state and local governments—particularly those whose taxing power is limited—look for new revenue sources, the issue raised by this case will have a continually enlarging impact. As noted above, *supra*, at 10 n.9, the constitutionality of the development fee is the most pressing issue among the current generation of land use and land use planning problems. The magnitude of the problem presented in this case is compounded by the fact that this is an appeal. Summary affirmance or dismissal for want of a substantial federal question necessarily would intensify state and local government use of such development fees because of the diminished standard of constitutional protection that the judiciary would afford. Under these circumstances, it cannot be seriously contended that the question presented is anything but substantial.

CONCLUSION

For these reasons, probable jurisdiction should be noted.

Respectfully submitted,

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July 13, 1988

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S000156

(Ct. of Appeal No. A030997)
(Super. Ct. No. 780 795)

RUSS BUILDING PARTNERSHIP,
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

(Ct. of App. No. A033493)
(Super. Ct. No. 789 365)

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

(Ct. of Appeal No. A033493)
(Super. Ct. No. 790 661)

CROCKER NATIONAL BANK, *et al.,*
Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

[Filed March 17, 1988]

In this case we are called upon to decide whether San Francisco's Transit Impact Development Fee (TIDF) ordinance may be applied to projects which, at the time of the enactment, were in the course of construction pursuant to building permits conditioned on the developers' participation "in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service . . . ." We conclude that the condition encompasses the TIDF, and therefore hold that the TIDF may be imposed on the projects without impairing the developers' vested rights.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1979, plaintiffs Crocker National Bank and Crocker Properties, Inc. (Crocker) and Pacific Gateway Associates Joint Venture (Pacific) sought approval from defendant City and County of San Francisco (City) for the construction of two new office developments in the City's downtown area. As required under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), an environmental impact report (EIR) was prepared for each proposed project, detailing its probable impact on the downtown environment.

The draft EIR's revealed that the new office buildings would have an adverse impact on the San Francisco Municipal Railway system in the form of increased demand for public transportation downtown. That disclosure led to adverse public comment on the proposed projects, in response to which the developers proposed to mitigate the impact of their projects on the demand for transportation by participating in a transit funding mechanism if one were established by the City.[1]

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[1] Crocker responded to the public concern by adding the following to its draft EIR on May 18, 1979: "In recognition of the need for public transit services to meet peak demand generated by

The permit for Crocker's project was approved by the San Francisco Planning Commission's (Commission) Resolution No. 8332 on July 26, 1979; Pacific's permit was approved by Resolution No. 8378 on September 20, 1979. Each resolution contained the following language: "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, [the developer] shall participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." The Commission imposed a similar "transit mitigation condition" on every other downtown office permit it approved in the latter half of 1979.[2]

On May 5, 1981, the San Francisco Board of Supervisors enacted the TIDF ordinance. (Ord. No. 224-81, codified at S.F. Admin. Code, § 38.1 et seq. [hereinafter ordinance].) The ordinance, which became effective the

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cumulative office development in the Downtown District, Crocker would consider shared participation in a downtown assessment district, or other such mechanism, to provide funds for mass transit, should such a mechanism be established."

Pacific responded by adding the following to its draft EIR on July 26, 1979: "The project sponsor recognizes the need for expanded transit services to meet the peak demand generated by cumulative office development in downtown San Francisco to which this project would add; therefore, the project sponsor will contribute to funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project, through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City."

[2] It appears the Commission's practice of imposing transit mitigation conditions on downtown office developments began as early as January 4, 1979, when it approved an office project on the condition that "[t]he owner of the project shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the [C]ity in which the project is located." (Com. Res. No. 8142.)

following month, requires developers of downtown buildings containing new office space to pay a TIDF as a condition of issuance of a certificate of completion and occupancy. (S.F. Admin. Code, § 38.4) The TIDF, not to exceed $5 per sqaure foot of new office space, provides revenue for the municipal railway to offset the the anticipated costs of the increased peak-period ridership generated by the new office space over the useful life of each office building. (S.F. Admin. Code, § 38.5.) The ordinance appears to be the first transit funding mechanism of its kind in California.[3]

Plaintiff Russ Building Partnership (Russ) filed a class action suit against the City to have the ordinance declared invalid on its face and as applied.[4] Crocker and Pacific filed a separate suit against the City challenging the "retroactive" application of the ordinance to buildings under construction before the ordinance was enacted.[5]

After separate trials on the validity of the fee and its "retroactive" application, the trial court entered judgments in favor of the City, finding that the TIDF is a

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[3] At the time Crocker's and Pacific's permits were issued, the notion that increasing costs of public transit service could be exclusively assigned to new development on a marginal cost basis had not been incorporated into a public financing mechanism.

[4] Russ represents approximately 6,000 similarly situated property owners in downtown San Francisco.

[5] Neither Crocker nor Pacific had received a certificate of final completion and occupancy as of the effective date of the ordinance, and it is undisputed that both projects meet the description of developments to which the TIDF applies in the ordinance as originally enacted and as amended in 1982. (See Ord. No. 275-82.) Instead of paying the TIDF in a lump sum, the developers have elected the statutory option of making installment payments over a 35-year period and, by agreement with the City, are depositing the fees under protest into an escrow fund. Crocker's fee is estimated to be $2,468,225; Pacific's is approximately $2,422,060.

valid development fee and that application of the ordinance to Crocker and Pacific did not impair their vested rights. All plaintiffs filed appeals, which were consolidated. The Court of Appeals upheld the validity of the TIDF, rejecting various constitutional and other attacks on the ordinance, but, by a divided vote, reversed the judgment as to Crocker and Pacific. Both Russ and the City petitioned for review. We granted the City's petition and denied Russ's, thus leaving intact the lower court ruling that the TIDF is a valid development fee. Pursuant to rule 29.2 of the California Rules of Court, we limited review to the interpretation of the resolutions authorizing Crocker's and Pacific's building permits and to whether the resolutions gave them adequate notice of the subsequently imposed TIDF.[6]

II. DISCUSSION

"It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit . [Citations.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." (Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, 791, cert. den. and app. dism. (1977) 429 U.S. 1083.) " 'The rule is grounded upon the constitutional

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[6] Plaintiffs subsequently requested that we expand the issues (see Cal. Rules of Court, rule 29.2(b)) to consider whether the TIDF violates the takings clause of the United States Constitution, as interpreted in the United States Supreme Court's recent decision in Nollan v. California Coastal Commission (1987) —— U.S. —— [107 S.Ct. 3141]. (*Nollan* was decided after we granted review and before oral argument.) We denied the request.

principle that property may not be taken without due process of law.' " (Urban Renewal Agency v. California Coastal Zone Conservation Com. (1975) 15 Cal.3d 577, 583-584, quoting Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal.App.3d 534, 543; see also Highland Development Co. v. City of Los Angeles (1985) 170 Cal.App.3d 169, 186.) The vested rights doctrine protects the developer's right not only to construct, but also to use the premises as authorized by the permit. (County of San Diego v. McClurken (1951) 37 Cal.2d 683, 691.)

Plaintiffs [7] had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the City enacted the TIDF ordinance. Thus, they had a vested right to complete the buildings and occupy them under the conditions contained in the permits. It is clear that if the resolutions authorizing plaintiffs' building permits did not contain the transit mitigation condition, application of the later-enacted TIDF ordinance to plaintiffs would impair their vested rights and violate due process.(See *post*, p. — [typed opn. at pp. 21-23].) However, if the TIDF falls among the funding mechanisms contemplated by the resolutions, then application of the ordinance to plaintiffs is proper. Our task is to decide if the transit mitigation condition included the eventuality of the TIDF ordinance. We find that it did.

A. *The Transit Mitigation Condition Contemplated the Later Imposition of the TIDF*

The City maintains that the language of the transit mitigation condition was intended to include a funding mechanism such as the TIDF, which applies only to new office development and which is directed at recovering

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[7] The term "plaintiffs" as used in the remainder of this opinion refers only to Crocker and Pacific and not to Russ.

the anticipated cost of meeting the expanded transportation needs generated by that new development. Plaintiffs argue that it was intended only to describe a funding mechanism which would include prior and present development in its sweep, not one directed solely at new development, and that for this and other reasons the TIDF is not a "downtown assessment district, or similar fair and appropriate mechanism" within the meaning of the condition. We find that while a mechanism which applies to both existing and new development certainly would be within the scope of the condition, nothing in the language compels a conclusion that the condition was intended to be so limited, or to exclude a mechanism such as the TIDF which applies only to new properties. Moreover, we find that the TIDF falls well within the range of funding mechanisms contemplated by the words "similar," "fair" and "appropriate."

We apply familiar principles of statutory construction.[8] "We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.]" (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.) "An equally basic rule of statutory construction is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (Rich v. State Board of Optometry (1965) 235 Cal.App.2d 591, 604; *Moyer*, *supra*, at p. 230.) "Although a court may properly rely on extrinsic aids, it should first turn to the words of the

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[8] The rules of statutory construction apply equally to the construction of ordinances. (County of Madera v. Superior Court (1974) 39 Cal. App. 3d 665, 668.) Thus they may be properly applied to resolutions of the Commission such as those at issue here, which, under the City's charter, are to be treated as if they were themselves ordinances. (Terminal Plaza Corp. v. City and County of San Francisco (1986) 186 Cal. App. 3d 814, 826, fn. 7; S.F. Planning Code, § 174.)

statute to determine the intent of the Legislature." (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.) We also examine the history and background of the statute to discern the statutory objective. (People v. Navarro (1972) 7 Cal.3d 248, 273.)

1. *The Language of the Condition Is Inclusive of the TIDF*

We note at the outset that the condition was enacted "[i]n recognition of the need for expanded transportation services . . . generated by cumulative office development in the downtown area. . . ." (See *ante*, p. — [typed opn. at p. 3].) We find the trial court's analysis on this point persuasive: "The words 'need for expanded transportation services' connote that . . . additional transportation services would be required. [Emphasis omitted.] The words 'generated by cumulative office development' suggest that the additional services would be required because of new office development. When an EIR is prepared, a cumulative impact analysis is made defining the existing buildings and the transit demand they generated as the status quo baseline, against which the effect of the proposed project and cumulative impacts are measured. [Citations.] [9] [¶] The transit mitiga-

[9] The term "cumulative office development" is arguably susceptible of two interpretations. Webster's New International Dictionary (2d ed., unabridge) defines "cumulative" as: "1. Composed of accumulated parts; formed, or becoming larger, by gathering or successive additions. . . . [¶] 2. Subject to cumulation, that is to be, or may be, added. . . ." Plaintiffs urge us in effect to adopt the first of these definitions, which would support their reading that the funding mechanism contemplated was necessarily one addressed at mitigating the effects of "accumulated" (i.e., old *and* new) downtown office development. We find the second definition, however, more closely approximates the meaning of the word "cumulative" as employed in state environmental legislation. (See CEQA (Pub. Resources Code, § 21000 et seq.), § 21083, subd. (b); Guide-

tion condition goes on to provide for funds for 'maintaining and *augmenting* transportation service. . . .' The use of funds to augment transportation service contemplates the need for additional transit service as a result of new office construction.[10] Implicit in the language is a funding mechanism in the form of an ordinance that would address the cost of providing additional transit service required by new office development." (Emphasis in original.)

We next address the words "downtown assessment district, or similar fair and appropriate mechanism," and whether they encompass the TIDF. We conclude that they do.

A special assessment is "a charge imposed on particular real property for a local public improvement of direct benefit to that property. . . ." (Solvang Mun. Improvement Dist. v. Board of Supervisors (1980) 112 Cal.App. 3d 545, 552.) An "assessment district" consists of the

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lines for Implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.), § 15355 (formerly § 15023.5); see also San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal. App. 3d 61, 68, 73-74, 79.) Thus, like the trial court, we interpret the words "cumulative office development" to mean new or additional, as opposed to accumulated, office development.

This interpretation is further supported by the fact that even after the Commission had expressly endorsed the concept of a transit impact development fee (Com. Res. No. 8543 (Mar. 27, 1980) (see *post,* p. —— [typed opn. at pp. 19-20])) it retained the "cumulative office development" language in later resolutions containing transit mitigation conditions. (See, e.g., Com. Res. No. 8647 (July 10, 1980).)]

[10] The resolutions' reference to a funding mechanism to provide funds for "maintaining" as well as "augmenting" transportation service is not inconsistent with this interpretation. New office projects will place additional burdens on maintenance of the transit system, and it will certainly be necessary to maintain the augmented service.

property or properties to be benfited by such improvement and to be specially assessed to bear the expense. (Dawson v. Town of Los Altos Hills (1976) 16 Cal.3d 676, 683; see generally Improvement Act of 1911 (Sts. & Hy. Code § 5000 et seq.); Municipal Improvement Act of 1913 (Sts. & Hy. Code § 10000 et seq.).) An assessment district is formed by local legislative resolution (*Dawson, supra*), and provides a compensating benefit to each affected property owner. (See Spring Street Co. v. City of Los Angeles (1915) 170 Cal. 24, 30.) Interested parties are afforded a hearing at which they may question any aspect of the proposed improvement, assessment or district, and a majority of affected property owners protesting the proposed improvement can ordinarily block the formation of a district, subject to a four-fifths majority override by the legislative body. (*Dawson, supra,* 16 Cal.3d at p. 683 and fn. 4.)

The TIDF shares several key features with assessment districts. Like an assessment district the TIDF applies to properties within a geographically defined area, the funds it generates are earmarked to offset demands created by the affected properties, it benefits those from whom the fee is collected (by facilitating public transportation to their office projects), and it is the product of the democratic process, having been adopted by the board of supervisors after public hearing.

Plaintiffs contest the significance of these similarities by pointing to certain marked differences between the typical assessment district and the TIDF. They argue that a transit fee that singles out new buildings is not at all similar to any assessment district existing when the permits were approved. They also maintain the TIDF is unlike typical assessment districts in that it is not calculated directly on the basis of the benefit received, it is a lump sum exaction rather than a monthly or annual assessment and it is based on a 45-year cost projection

rather than on actual expenditures. Plaintiffs also point out that the TIDF ordinance does not permit the owners of the majority of the affected land to block the fee or the formation of the district if the board of supervisors fails to overrule them by a four-fifths vote. Finally, plaintiffs claim the TIDF must be viewed as dissimilar from an assessment district because its impact on them "exceeds many times the burden that any form of assessment district or similar mechanism imposing monthly or annual charges upon all properties within its bounds would have imposed."

We find plaintiffs' argument unconvincing. "Similar" does not mean "identical." Funding devices which are "similar" will necessarily have some differences. We find the asserted differences between the two mechanisms under consideration insufficient to render them "dissimilar" within the meaning of the transit mitigation condition.

The TIDF is not dissimilar to an assessment district because it singles out new buildings. Assessment district funding mechanisms are not necessarily applied to both existing and proposed buildings. In J.W. Jones Companies v. City of San Diego (1984) 157 Cal.App.3d 745, 758, the Court of Appeal upheld a special assessment which was applicable only to new projects for the purpose of providing funds to build new or expanded public facilities. The fact that the special assessment in *Jones* was novel and was enacted after plaintiffs' projects were approved does not foreclose an interpretation that the conditions embrace mechanisms limited to new projects. At the time the Commission passed the resolutions no municipality in California had conditioned building permits on participation in a transit funding mechanism. Any mechanism the City ultimately developed would be novel. Plaintiffs should have anticipated being required to participate in any constitutionally permissible funding

mechanism that fell within the broad language of the condition.

Nor do the remaining differences asserted by plaintiffs render the TIDF dissimilar to an assessment district. As would be the case with an assessment district, the benefit on which the TIDF is calculated is the value of increased transit service required to transport people to and from plaintiffs' projects. It is true the lump sum nature of the fee distinguishes it from a periodic assessment; however, inasmuch as the ordinance permits installment payments (see *ante*, p. ——, fn.5 [typed opn. at p. 5, fn. 5]) the TIDF is not significantly different from a funding mechanism requiring monthly or annual contributions, even if the total is based on projected rather than actual expenditures. Similarly insignificant is the fact that the TIDF ordinance lacks the majority protest provision generally associated with assessment districts, since plaintiffs were already foreclosed from any such attempt to block the fee by the condition's requirement that they "particpiate" in a funding mechanism. Finally, the financial burden of the TIDF is not dissimilar to that imposed by some assessment districts. As the trial court stated, "[h]ad an assessment district been formed to cover the cost of providing additional transit service attributable to new buildings[,] with only those new buildings . . . being assessed, logic would suggest that the cost would be essentially the same as the TIDF." [11] In any case, even if the TIDF imposed a somewhat greater financial burden on plaintiffs than other funding mechanisms, financial burden is only one of many features to be considered. We conclude that the TIDF funding mechanism is similar to an assessment district within the meaning of the conditions.

[11] The trial court found that the TIDF was less than the cost of the increased services required by the new office developments. This finding was upheld on appeal and is not within our scope of review.

2. *The History and Background of the Transit Mitigation Condition and Extrinsic Evidence of the Commission's Intent Also Suggest the Intended Inclusion of the TIDF*

Our reading of the transit mitigation condition is also supported by its history and background. The trial court found, based on a stipulation of the parties, that "the transportation mitigation conditions were included in [p]laintiffs' permits in response to an adverse environmental impact on transportation identified in the [EIR] for both [p]laintiffs' properties." (See *ante*, p. — [typed opn. at pp. 2-3].) It is undisputed that the Commission's authority extends only to new developments and to those existing properties for which new developments or uses have been proposed. Thus it would be incongruous to conclude that when the Commission demanded that plaintiffs participate in a transit funding mechanism to mitigate the adverse transit impacts identified in the EIR's, it intended to exempt plaintiffs from any later-established transit mitigation measure which, unlike a typical assessment district, did not apply to existing buildings. Rather, the background of the transit mitigation condition suggests that the Commission intended it to include funding mechanisms that would require new office developments to help finance the cost of the additional transit service attributable to those projects.

Evidence from the Commission's own records also indicates that at the time it was enacted the transit mitigation condition language was intended to encompass whatever financing mechanism would be developed as a result of the City's ongoing study of the transit funding problem. At the public hearing on August 9, 1979, for the final EIR for the Pacific project, Commissioner Dearman observed that both Crocker and Pacific had stated they were willing to participate in a transit funding mechanism and asked why something was not being done if the developers were willing. Mr. Green, a senior member

of the City planning department who helped draft the condition, responded as follows: "There are a number of ways to implement a special assessment district or some form of mechanism for providing funds for improved transit service in the downtown area. We couldn't really get into the range of options or I can't tell even what the necessary Board of Supervisors' action would be. [¶] What we do need to do is a fairly detailed legal study basically to see exactly what our options are and then present an ordinance to the Board for approval—and we don't see that happening for a good six months to a year primarily because we don't have the funds to do that particular study." (Transcript of Proceedings of the Regular Meeting of the San Francisco City Planning Commission (Aug. 9, 1979) p. 10.)[12]

Commission action subsequent to its passage of the resolutions approving plaintiffs' permits also indicates that it intended the transit mitigation condition to include a range of funding devices broad enough to encompass the TIDF. On March 27, 1980, the Commission passed a resolution endorsing a transit impact development fee then being considered by the board of super-

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[12] The notion of funding the municipal railway system through an assessment district appears to have originated with the San Francisco Public Utilities Commission (PUC). In December 1978, it was suggested in a PUC hearing on municipal railway fares and revenues that a downtown assessment district be established to help fund the system. In January 1979, the consulting firm that had convened this hearing reported that an assessment district was the only currently apparent source of significant funding. The consultant's May 1979 report again identified a financial district assessment district as one proposal for generating revenues for the system. It was not until February 1, 1982, however, some nine months after the TIDF ordinance was enacted, that the board of supervisors adopted a resolution declaring its intent to form a "Core Area Transit Maintenance District" embracing all commercial downtown properties, both office and nonoffice, existing and new. (Bd. of Supervisors Res. No. 45-82.) That district was never formed.

visors. The resolution states: "[whereas], [t]he City Planning Commission has required, as a condition of approval in seven recent development proposals [including] plaintiffs'] . . ., that developers participate in a fair and appropriate mechanism to provide funds for maintaining and augmenting mass transit services, should such a mechanism be established by the City; and [¶] [whereas], [t]he Board of Supervisors is now considering a proposed [o]rdinance . . . directing the PUC to establish a transit impact development fee to recover the cost of operation and maintenance of additional public transit service in the downtown area . . .; [¶] . . . the City Planning Commission hereby endorses the concept of legislation which would establish reasonable fees on new . . . structures in the downtown area to help defray the additional costs of public transit resulting from occupancy of the new structures. . . ." (Com. Res. No. 8543.)[13] Although the resolution does not explicitly state that the Commission intended its earlier-imposed transit mitigation conditions to embrace such a development fee, it does show the Commission's understanding six to eight months later that development fees fall within the conditions. While " 'subsequent legislation interpreting [a] statute . . . [cannot] change the meaning [of the earlier enactment,] it [does] suppl[y] an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing at the time the legislation was enacted.' [Citation.]" (West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 610.) Thus Resolution No. 8543 supports our conclusion that the TIDF is within the range of

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[13] The proposed ordinance endorsed by Resolution No. 8543 would have imposed a development fee not only on new office developments but on all new commercial downtown property development. Nevertheless, it is sufficiently similar to the ordinance ultimately enacted to suggest that the Commission also would have endorsed the TIDF if the board of supervisors had proposed it at that time.

mechanisms contemplated by the transit mitigation conditions.[14]

B. *Plaintiffs Had No Greater Vested Rights Than Those Granted Them Under The Permits*

Failing their narrow reading of the transit mitigation condition, plaintiffs argue that it is not the intent of the language but rather what plaintiffs understood it to provide which is dispositive of their claim. According to plaintiffs, their vested rights to develop their projects were limited by the condition only to the extent its language provided "notice . . . of such nature as reasonably to convey the required information . . . ." (Mullane v. Central Hanover Trust Co. (1950) 339 U.S. 306, 314; see also Horn v. County of Ventura (1979) 24 Cal.3d 605, 612-619.) They insist that the language of the condition is ambiguous and alerted them only to the possibility of a downtown-wide assessment district, including both new and existing office space, which would require annual recoupment of costs actually incurred. Thus, according to plaintiffs, application of the TIDF to their projects violates their constitutional right to due process.

We reject this argument. A vested right requires more than a good faith subjective belief that one has it. (See *Avco, supra,* 17 Cal.3d at p. 797.) When a legislative body gives a private party a limited right, the party is not exempted from the limitation merely because it is

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[14] Plaintiffs argue that another post-permit event is more probative of the Commission's intent. In July 1980, the Commission enacted the first of a series of transit mitigation conditions containing no reference to a "downtown assessment district, or similar fair and appropriate mechanism." (See Com. Res. No. 8647 (July 10, 1980).) Rather than reflecting on the Commission's intent in 1979, however, this change is explained by the fact that by mid-1980 the Commission was aware of legal difficulties in establishing an assessment district and the board of supervisors was actively promoting the concept of a development fee.

phrased ambiguously. (Cf. Atkins v. Parker (1985) 472 U.S. 115, 131.) Ambiguous enactments are subject to construction according to established rules, and while a vested right may protect a party from future enactments it provides no protection against the appropriate application of those rules to the enactment that created the right.

Plaintiffs also advance an estoppel argument (Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal.App.3d 965, 974-975), which we similarly reject. While it is true that the vested rights doctrine is " 'predicated upon estoppel of the governing body' " (*Avco, supra,* 17 Cal.3d at p. 793), "[a]n equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include (1) a promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question and (2) reasonable reliance on the promise by the promisee to the promisee's detriment. [*Ibid.*]" (Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal.3d 858, 867.) In this case, as we have found, the government's "promise" was limited by the transit mitigation condition. To the extent plaintiffs relied on their own self-serving interpretation of the condition, such reliance must be considered unreasonable.

III. CONCLUSION

At the time the Commission authorized plaintiffs' building permits, plaintiffs understood that they would be required to pay some amount to fund increased transit demands as a condition to developing their properties. The TIDF is consistent with the language of the condition. While the TIDF is not an assessment district, it is a "similar fair and appropriate" transit funding mechanism. It is "similar" because it shares many features with assessment districts and because it requires plaintiffs to pay the costs of the increased transit demand generated by their new office development; it is "fair"

because it was democratically enacted by the board of supervisors and applies without distinction to all new downtown office projects; and it is "appropriate" because it serves the purposes contemplated by the transit mitigation condition.

The history of the condition confirms that its purpose was to require developers to fund the increased transit demands generated by their projects. The TIDF mechanism is consistent with this purpose. This interpretation is further supported by extrinsic evidence of the Commission's intent.

As the trial court observed, plaintiffs' vested rights are "no greater than those specifically granted by the permit[s] themselves]. [Citation.] Given the transit mitigation condition in their permits, [p]laintiffs were required to participate in some mechanism to be established by the C[ity]. To exempt [p]laintiffs from the TIDF [o]rdinance would give them greater rights than those granted by their permits." We therefore conclude that application of the TIDF ordinance to plaintiffs does not impair their vested rights.

The judgment of the Court of Appeal is reversed as to plaintiffs Crocker and Pacific and affirmed in all other respects. The Court of Appeal shall order those sections of its opinion which do not address the issues disposed of herein to be published in the official reports. (Cal. Rules of Court, Rule 976(d); see Agricultural Labor Relations Board v. Tex-Cal Land Management, Inc. (1987) 43 Cal.3d 696, 709, fn. 12.)[15]

BROUSSARD, J.

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[15] Specifically, the court shall not publish part V of its majority opinion, references to the "retroactivity" issue in the first and last paragraphs of the majority opinion, or any of the concurring and dissenting opinion except the first sentence. The court also is directed to correct a typographical error in the majority opinion by changing the "$6-per-square-foot" reference in part VI(D)(4) to "$.60-per-square foot."

WE CONCUR:

MOSK, J.

PANELLI, J.

ARGUELLES, J.

EAGLESON, J.

KAUFMAN, J.

DISSENTING OPINION BY LUCAS, C.J.

I respectfully dissent.

Although I believe that the Transit Impact Development Fee Ordinance (TIDF) may well be constitutionally valid (an issue not presently before us), I cannot agree plaintiffs were provided adequate notice of the imposition of such a fee in their building permits.

The majority relies heavily on the planning commission's records which apparently indicate that "at the time it was enacted the transit mitigation condition language was intended to encompass whatever financing mechanism would be developed as a result of the City's ongoing study of the transit funding problem." (Majority opn. at p. — [typed opn. at p. 17].) The Commission's intent, however, is irrelevant to the issue of the adequacy of plaintiffs' notice. By stating that plaintiffs "shall participate in a downtown assessment district, or similar, fair and appropriate mechanism," the permit language alerted plaintiffs only to the possibility that some fee similar to the assessment generated by a downtown-wide assessment district, applicable to preexisting and new development, could be levied on their projects. I disagree with the majority that the TIDF, which applies only to new buildings and essentially demands from plaintiffs the lion's share of the costs for the increased transit fee over the next 45 years, was contemplated by the ambiguous language of the permits.

Similarly, the majority's reliance on the additional notice implied by public reaction to plaintiffs' draft environmental impact reports is misplaced. In their final reports, plaintiffs simply responded to public concerns by recognizing the need for additional public transit services to meet increased public demand generated by "cumulative office development" in the downtown area. Here, plaintiffs agreed to "contribute to funds for main-

taining and augmenting transit service, in an amount proportionate to the demand created by this project, through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City." As the Court of Appeal stated: "The environmental impact report[s] gave plaintiffs no more information than the language in the building permits, which . . . was too general to support this type of exaction."

Accordingly, I agree with the Court of Appeal's conclusion that, "Since the entire downtown area is affected by the peak demand in ridership, it would be unreasonable to expect plaintiffs to anticipate that only a few [new] office buildings would be covered by the funding mechanism. [I] do not think the words 'similar, fair and appropriate mechanism' reasonably could be construed to include the exclusive funding mechanism of the type in effect here. When a vested right is implicated, due process requires that notice be meaningful or 'of such nature as reasonable to convey the required information. . . ." (Quoting Mullane v. Central Hanover Trust Co. (1950) 339 U.S. 306, 314.) Neither the planning commission's uncommunicated intent nor the environmental impact report gave plaintiffs reasonable notice as a matter of law that they would be required to pay the large fee imposed by the TIDF. I therefore agree with the Court of Appeal that the retroactive application of the ordinance to plaintiffs' project is unconstitutional.

I would affirm the judgment of the Court of Appeal in its entirety.

LUCAS, C.J.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
FIRST DISTRICT, DIVISION FIVE

No. AO30997, AO33493/SOOO156

RUSS BUILDING PARTNERSHIP,
Appellant

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Appellant

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent

CROCKER NATIONAL BANK, *et al.*,
Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent

ORDER GRANTING REVIEW
AFTER JUDGMENT BY THE
COURT OF APPEAL

[Filed April 30, 1987]

IN BANK

Petitions for review GRANTED.

Pursuant to Rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.

Review shall not extend to the issues raised in the answers to the petitions for review.

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Chief Justice

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/s/ Mosk
Associate Justice

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/s/ Broussard
Associate Justice

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/s/ Arguelles
Associate Justice

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/s/ Kaufman
Associate Justice

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Associate Justice

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Associate Justice

RULE 29.2. ISSUES ON REVIEW GRANT AND HOLD

(a) (Decision on limited issues) On review of the decision of the Court of Appeal, the Supreme Court may review and decide any or all issues in the cause. (Adopted effective May 6, 1985.)

(b) (Specification of issues) After granting review of a decision of a Court of Appeal, the Supreme Court may specify the issues to be argued. Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them.

Notwithstanding its specification of issues, the Supreme Court may order argument on fewer or additional issues, or on the entire cause. The court shall give the parties reasonable notice of any specification of the issues to be argued and of any change in its specification of issues. (Adopted effective May 6, 1985.)

(c) (Grant and hold) After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of another cause pending before the court. (Adopted effective May 6, 1985.)

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

A030997
San Francisco
Sup.Ct.No. 780795

RUSS BUILDING PARTNERSHIP,
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent;

A033493
San Francisco
Sup.Ct.No. 789365

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent;

A033493
San Francisco
Sup.Ct.No. 790661

CROCKER NATIONAL BANK, *et al.*,
Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

[Filed Jan. 20, 1987]

We hold that the San Francisco Transit Impact Development Fee Ordinance is valid. It may not be applied retroactively as to Pacific Gateway Associates Joint Venture, Crocker National Bank and Crocker Properties, Inc.

In this consolidated appeal, plaintiff Russ Building Partnership [1] (hereafter Russ Building plaintiff), and plaintiffs Pacific Gateway Associates Joint Venture (Pacific), Crocker National Bank (CNB), and Crocker Properties, Inc., (hereafter collectively Crocker plaintiffs) appeal from a judgment upholding the validity of San Francisco's Transit Impact Development Fee Ordinance (the Ordinance). They contend that the trial court erred (1) in treating the Ordinance as a development fee and (2) in finding that the Ordinance could not be success-

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[1] The Russ Building Partnership filed a class action against defendant City and County of San Francisco on behalf of approximately 6,000 similarly situated property owners in downtown San Francisco.

fully challenged under articles XIII A and XIII B of the California Constitution, or the equal protection and due process clauses of the federal and state Constitutions.

I

In May 1981, the City and County of San Francisco (city) enacted Ordinance No. 224-81 "[i]n order to be able to provide public transit services for new development in the downtown area . . . ." The Ordinance requires that the owners of buildings located in downtown San Francisco which contain newly developed office space, who have not yet received a building permit or a certificate of completion prior to the effective date of the Ordinance, pay a transit fee as a condition of issuance of a certificate of completion and occupancy. The fee is designed to provide revenue for the San Francisco Municipal Railway system (Muni) to offset the anticipated increased costs to accommodate the new riders during peak commute hours generated by the construction of new office space in the downtown area. The San Francisco Board of Supervisors fixed the fee to be paid by property owners at a maximum of $5 per square foot of new office space.[2]

Under the Ordinance, the transit fee is payable by each building's owner in a lump sum at the end of construction. Alternatively, the owner may choose to amortize the fee over several years and make installment payments. The amount of the fee assessed is to cover

[2] One of the city's consultants, Bruce Bernhard, manager of the analysis unit of the San Francisco Public Utilities Commission Bureau of Finance, estimated the increased transit costs attributable to new riders as $9.18 per square foot in 1981. He later revised this figure to $6.57. Defendant city also employed the consulting firm of Touche-Ross in March 1983 to prepare a new estimate of increased incremental transit costs for use at trial. Touche-Ross's initial estimate was $8.71 per square foot; this estimate was later adjusted downward to $8.36.

increased transit costs which the city predicts will be generated over the 45-year life of each office building. There is no provision for adjusting the amount owed by each owner depending on the actual "life" of the building or actual transit operation costs. The Board of Supervisors may, however, adjust the \$5-per-square-foot figure for future developers, depending on changing conditions.

In May 1981, Russ Building plaintiff filed a class action suit against the city to have the Ordinance declared invalid on its face and in its application. Another suit was filed against the city by Crocker plaintiffs, who additionally challenged the retroactive application of the Ordinance. The two cases were consolidated for trial of common issues.

The trial court entered judgment in favor of the city, finding that the Ordinance was not a tax and was a "debatably rational" development fee. It also found that the retroactive application of the Ordinance as against the Crocker plaintiffs was legal. Appeals were taken separately from the trial court's judgments and the cases have been consolidated for appeal before this court.

I

Both sets of plaintiffs argue that the transit impact fee is not a legitimate development fee because the \$5-per-square-foot fee exceeds the reasonable cost of the increased services to be provided, and thus is a "special tax" which must be approved by two-thirds of the electorate pursuant to California Constitution, article XIII A, section 4 (hereafter referred to as section 4). Whether the transit fee is a development fee or a special tax is an issue of law. (See generally, *Heckendorn* v. *City of San Marino* (1986) 42 Cal.3d 481, 487.)

Typically, a development fee is an exaction imposed as a precondition for the privilege of developing the land.

Such fees are commonly imposed on developers by local governments in order to lessen the adverse impact of increased population generated by the development. (See *Candid Enterprises, Inc.* v. *Grossmont Union High School Dist.* (1985) 39 Cal.3d 878 [school-impact fees]; *Associated Home Builders etc., Inc.* v. *City of Walnut Creek* (1971) 4 Cal.3d 633 [dedication of land for park space or fee in lieu thereof].) This is one of the most common subjects of local police power regulations. (See *Trent Meredith, Inc.* v. *City of Oxnard* (1981) 114 Cal.App.3d 317, 325.) " 'The position of the public entity is that this arrangement is only fair. The developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore he should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improvements and services required by the new development. . . .' " (*Ibid.*)

The question which remains is how does the transit fee imposed here differ from a "special tax" within the meaning of section 4. The distinction between a tax and other exactments is admittedly blurred—taking on a different meaning in different contexts. Our Supreme Court has defined "special tax" in section 4 "to mean taxes levied for a specific purpose rather than a levy placed in the general fund to be utilized for general governmental purposes. (*City and County of San Francisco* v. *Farrell* (1982) 32 Cal.3d 47, 57)." (*Heckendorn* v. *City of San Marino*, *supra*, 42 Cal.3d at p. 489.) In reaching this conclusion, the court held that the term must be strictly construed and ambiguities resolved so as to limit the situations to which the two-thirds requirement applies. (*City and County of San Francisco* v. *Farrell* (1982) 32 Cal.3d 47, 52.) The court reasoned that a restrictive interpretation was necessary because of the inherently undemocratic requirement that the tax must

be approved by a supermajority of the electorate. (*Ibid.*)

While the Ordinance in this case does exact a fee for a specific purpose—to fund the cost of providing for increased ridership caused by the development—the crucial inquiry is whether the transit fee is a tax at all. The definition in *Farrell* makes the distinction between types of taxes only. To ascertain whether the transit fee is a tax, we first turn to the purpose behind section 4, using the strict interpretation approach announced in *Farrell*.

A

California Constitution, article XIIIA was enacted to provide effective real property tax relief. "[S]ections 3 and 4 combine to place restrictions upon the imposition of such taxes." (*City and County of San Francisco* v. *Farrell*, *supra*, 32 Cal.3d at p. 56.) One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. (See *Heckendorn* v. *City of San Marino*, *supra*, 42 Cal.3d at p. 489.) In contrast, the transit fee imposed by the Ordinance is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the developer to construct office buildings and is directly tied to the increase in ridership that this construction will possibly generate.

In *Terminal Plaza Corp.* v. *City and County of San Francisco* (1986) 177 Cal.App.3d 892, the city enacted an ordinance which required residential hotel owners to make a one-for-one replacement of residential units which were lost through conversion or demolition as a condition for obtaining a building permit. In distinguishing this exactment from a special tax, the court concluded that "fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue

purposes, have been considered outside the realm of 'special taxes.' [Citations.]" (*Id.*, at p. 906.)

The transit fees required by the Ordinance were limited to the estimated costs involved to serve the increased ridership. None of the transit fees are earmarked for general revenue purposes. Further, unlike most taxes, the fees imposed by this Ordinance are not compulsory but are exacted only if the developer voluntarily chooses to create new office space. (See *id.*, at p. 907; *Trent Meredith, Inc.* v. *City of Oxnard*, *supra*, 114 Cal.App.3d at p. 328.) Developers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel. There is little difference between these public improvements and the benefit to the public from the increased transit services paid for by the transit fee. In all instances, there is an increased burden on public improvements by virtue of the development. Moreover, such a construction will not interfere with giving voters effective property tax relief, the central purpose behind article XIII A of the California Constitution. (*City and County of San Francisco* v. *Farrell*, *supra*, 32 Cal.3d at p. 56.)

In *Beaumont Investors* v. *Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, the reviewing court had to decide whether a "facilities fee" imposed for connection to the local water district's system was a special tax. The developer argued that the fee exceeded the reasonable cost of construction of the water system improvements required by the development and is a special tax. The reviewing court agreed. It relied on Government Code section 50076. That section was part of legislation enacted to implement article XIII A of the California Constitution. That section provides: "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

(Stats. 1979, ch. 903, § 1.) The court concluded that the People failed to sustain their burden of proving that the facilities fee did not exceed the reasonable value of the services for which it was collected. (*Beaumont Investors, supra*, at p. 238.)

Unlike *Beaumont Investors*, the city has undertaken numerous studies and has held public hearings to determine the reasonable cost of the increased transit services. To this end, the city hired consultants to project long term needs and costs of transit services. Similarly, in *J. W. Jones Companies* v. *City of San Diego* (1984) 157 Cal.App.3d 745, the city imposed a "facilities benefit assessment" on undeveloped property as a condition of obtaining a building permit which partially financed various public services built to serve the anticipated population generated by the development. These public improvements included sewer, street and *transportation services*, among others. The court concluded this was not a special tax but a special assessment levied on property which was benefited by the public facilities. (*Id.*, at p. 758.)

Whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development, and it is not a "special tax" for purposes of section 4.

B

Plaintiffs also contend that the transit fee is a "proceed of taxes" within the meaning of California Constitution, article XIII B and is subject to its limitations. That provision places limits on the growth of appropriations at both the state and local government levels, and requires excess appropriations to be returned by a revision of the tax rate or fee schedule within the next two years. (Cal. Const., art. XIII B, § 2; see *County of*

Placer v. *Corin* (1980) 113 Cal.App.3d 443, 449.) The "[p]roceeds of taxes" subject to the limitation is defined as "all tax revenues and the proceeds to an entity of government, from (i) regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product, or service. . . ." (Cal. Const., art. XIII B, § 8, subd. (c).) Plaintiffs claim that the transit fee imposed by this Ordinance is a user charge or fee subject to the limitation. We disagree.

The transit fee is not a special tax within the meaning of section 4 and is not within the ambit of California Constitution, article XIII A, and therefore is not the type of revenue intended to be controlled by article XIII B of the California Constitution. Moreover, it is imposed as a condition of development of real property, which is not a regulatory license, user fee or charge. For these reasons, we conclude that the transit fee is not a "proceed of taxes" within the meaning of article XIII B. (See also *City Council* v. *South* (1983) 146 Cal.App.3d 320, 334-335.)

II

A

Plaintiffs claim that the Ordinance discriminates against owners of office buildings constructed after 1979, denying them access to government benefits on the same footing as owners of pre-1979 buildings, and that it arbitrarily singles out commercial buildings while giving retail stores in the downtown area a free ride.

Under an equal protection analysis, the transit fee as an economic regulation is presumed to be constitutional. (*Candid Enterprises, Inc.* v. *Grossmont Union High School Dist., supra,* 39 Cal.3d at p. 890.) Since developers are not a "suspect class" and development is not a "fundamental interest" (*ibid.*; see also *Trent Meredith, Inc.* v. *City of Oxnard, supra,* 114 Cal.App.3d at p. 328),

we determine only whether the " 'distinctions drawn by a challenged [Ordinance] bear some rational relationship to a conceivable legitimate state purpose.' " [Citations.]" (*Candid Enterprises, Inc.* v. *Grossmont Union High School Dist., supra*, at p. 890.)

The stated purpose of the Ordinance is "to require developers of new [commercial office space] in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway." (Ord. No. 224-81, § 38.3.) The impact fee is necessary because "[n]ew developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers." (Ord. No. 224-81, § 38.2.) The "Downtown Plan Environment Impact Report" indicated that the expansion of downtown office space is expected to exceed that of downtown retail space by 110 percent. The city concluded that "[f]uture increases in demand for public transit service" will therefore be "attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods." (Ord. No. 224-81, § 38.2.)

Consistent with the purpose of the Ordinance, the owners of new office space are required to pay for additional public facilities, the need for which is generated by their development. That the existing buildings will indirectly benefit from improved services does not result in such inequity as to offend equal protection principles. (See *J. W. Jones Companies* v. *City of San Diego, supra*, 157 Cal.App.3d at p. 757.)

Likewise, the argument that retail stores, which are also responsible for increased ridership, somehow got a windfall also fails. The Ordinance imposes the fee on the projected ridership directly and reasonably arising

from the new office space. The city may rationally conclude that office workers increase the need for transit services during peak hours. The conclusion that it is the office space, and not retail stores, that is primarily responsible for the need for improved transit services is properly left to the sound discretion of the local governing body. Since the trial court found this determination to be reasonably arrived at, this Ordinance must be upheld as being directly and additionally related to legitimate governmental goals. (*Terminal Plaza Corp.* v. *City and County of San Francisco, supra,* 177 Cal.App.3d at p. 910.) The trial court did not err in finding that the Ordinance does not violate equal protection standards.

B

Under a substantive due process analysis, "[a] law regulating or limiting the use of real property for the public welfare does not violate substantive due process as long as it is reasonably related to the accomplishment of a legitimate governmental interest. [Citations.]" (*Id.,* at *p.* 908.) Plaintiffs maintain that it is unreasonable to force developers to underwrite public transit costs over a 45-year period.

There was no dispute that an office building has a useful life of 45 years and that over that lifespan it will generate additional passengers for Muni. Expert testimony demonstrated that long term cost projections are employed in a variety of contexts, such as the purchase of capital equipment, financing pension funds and evaluating long term bonds and stocks. Such long term projections have been approved in deciding how much park and recreational space should be set aside to accommodate an increased population 40 years into the future. (See *Associated Home Builders etc., Inc.* v. *City of Walnut Creek, supra,* 4 Cal.3d at p. 639.) This is true even though inflation and other variables may affect the accuracy of such projections. Based on the data used by

the city's consultants, the trial court could properly conclude that the imposition of a lump sum fee representing increased transit costs over a 45-year period was not arbitrary or unreasonable and was not an unconstitutional taking of plaintiffs' property.

III

Our Supreme Court has held that "[d]ouble taxation occurs only when 'two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority, within the same jurisdiction during the same taxing period.'" (*Associated Home Builders etc., Inc.* v. *City of Walnut Creek*, *supra*, 4 Cal. 3d at p. 642, quoting Rhyne, Municipal Law, p. 673.) In *Associated Home Builders*, it was determined that the requirement of land dedication for recreational use or the payment of "in-lieu fees" as a precondition of approval for development was sufficiently different from a property tax so that no unconstitutional double taxation resulted. This case is dispositive of the issue before us. The Ordinance is a development fee, not a tax. (See discussion, part I A, *supra.*) It is charged one time, at the completion of construction of new office space, and does not recur as does a property tax. Furthermore, the transit fee is designed specifically to fund Muni maintenance and development, whereas a property tax provides general revenue to cover a wide range of municipal services.

Plaintiffs attempt to distinguish the facts of the *Associated Home Builders* case on the ground that the fee imposed there was calculated differently than the fee in the instant case. Relying on *Flynn* v. *San Francisco* (1941) 18 Cal.2d 210, they maintain that the transit fee is more akin to a property tax because both the transit fee and property taxes are calculated based on the number of square feet in the development. This argument is without merit. In *Flynn*, the city imposed a "license fee" on certain types of vehicles in addition

to an ad valorem tax on these same vehicles. The license fee was unrelated to use of vehicles or any regulatory purpose. The court found that it was imposed only as an incident of ownership, as was the ad valorem tax, and constituted double taxation. (*Id.* at pp. 214-215.) Regardless of the method of calculation, the transit fee is not imposed by virtue of property ownership, but is a fee for the privilege of developing real property and to defer increased costs of transit services. As such, it is identical to the fee imposed in *Associated Home Builders.* As a matter of law, the imposition of the transit fee does not result in double taxation.

IV

The Crocker plaintiffs separately contend that the enactment of the Ordinance violates section 3.598 of the San Francisco City Charter. That section provides that "[r]ates for each utility *except the municipal railway* shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility." (Emphasis added.) If there is a deficit for "said utility," section 3.598 of the San Francisco City Charter authorizes the imposition of a tax levy approved by a two-thirds vote of the Board of Supervisors. Under section 3.598, rates for Muni are proposed by the San Francisco Public Utilities Commission and are "approved, rejected or amended by the board of supervisors."

The trial court found that the "charter section specifically excepts the Muni from the requirements of the section." The trial court was correct in concluding that a Muni transit fee is not subject to the constraints of the above-cited language of section 3.598 of the San Francisco City Charter. Reviewing the plain language of the Ordinance, the board is not required to make up Muni deficits by levying a tax. The trial court correctly determined

that the transit fee imposed does not violate the charter provision.

Having concluded that the city may constitutionally enact the transit fee pursuant to its police power, we offer no opinion as to the wisdom of the fee itself or upon the legality of any other exaction. We are mindful of the local government's need to generate revenue to maintain the quality of life the residents of the city have come to expect. This has become increasingly difficult in the post-Proposition 13 era. The transit fee imposed falls within permissible bounds.

V

The Crocker plaintiffs next contend that the issuance of the building permits to them in July and September 1979, before the effective date of the Ordinance, prohibits the retroactive application of the Ordinance to their projects. The trial court agreed in part, finding that plaintiffs did acquire a vested interest to complete construction and to use their building in accordance with the terms of their permits. However, the trial court concluded that language conditioning issuance of the permit upon participation in some kind of transit funding mechanism put plaintiffs on notice that they might have to contribute for future transit service, and that the fee imposed herein could be reasonably anticipated from that language. We find the evidence does not support this conclusion.

A

Once a property owner has "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citations.]" (*Avco Community Developers, Inc.* v. *South Coast Regional Com.* (1976) 17 Cal.3d 785, 791; see generally *People* v. *H & H Properties* (1984) 154 Cal.App.3d 894, 899.) To take away

or interfere with that right without due process of law is unconstitutional. Here, plaintiffs had been issued building permits, had begun construction and made a substantial financial commitment to their projects almost two years before the Ordinance was enacted. As such, they obtained a vested right to complete the buildings and occupy them under the conditions in existence when the original building permits issued.

Relying on *People* v. *H & H Properties, supra,* 154 Cal.App.3d at pages 899-900, the city argues that the vested rights doctrine does not apply because there is nothing improper in imposing new taxes on existing property. That reliance is misplaced. There, an ordinance required developers of a condominium conversion project to furnish relocation assistance to its tenants and to pay either moving costs or compensation for anticipated rent increases. A condominium developer had received tentative and final map approval to proceed with the conversion before the ordinance was enacted. The reviewing court rejected a claim that the ordinance unconstitutionally interfered with the developer's vested rights, reasoning that the ordinance did not constitute an additional condition precedent to complete of the project since no further approvals were necessary. (*Ibid.*) When viewed in that light, the court found no distinction between that developer and similarly situated property owners who were bound by the rent control ordinance. (*Id.*, at p. 900.) In addition, the court noted that if the project loses its attractiveness, the developers could pull out. (*Id.*, at p. 902.)

In the present case, plaintiffs are prevented from using and occupying the completed buildings until they pay their share of the transit fee.[4] The retroactive application of the fee certainly interferes with the plaintiffs' vested

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[4] Pacific Gateway's fee is estimated to be $2,422,060 and CNB and Crocker plaintiffs must pay $2,468,225.

rights to use the buildings as originally approved and cannot be compared to a tax or exaction which is imposed upon existing buildings. Furthermore, as we discussed above, the transit fee is not a tax but a development fee, and depending on the stage of completion, the size of the fee may seriously affect a developer's ability to proceed with the project. While the court in *H & H Properties* noted that developers of completed projects are free to withdraw from plans to convert apartments into condominiums, plaintiffs herein have little use for a partially completed project if they choose not to continue because of the burden of the fee imposed. In conclusion, we agree with the trial court that, as a legal matter, the retroactive application of the transit fee to plaintiffs' projects interferes with a vested right.

B

However, the city successfully argued that language in the building permits put plaintiffs on notice that they had to contribute to a funding mechanism, such as a transit fee. The permits issued to plaintiffs contained the following language: "In recognition of the need for expanded transportation services *to meet peak demand generated by cumulative office development in the downtown area,* [*plaintiffs*] *shall participate in a downtown assessment district, or similar, fair and appropriate mechanism,* to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." (Emphasis added.)

Plaintiffs contended below that the italicized language could reasonably be interpreted to mean that *all* the buildings in the downtown area were to share the burden of increased transit costs regardless of when they were built, and that it is unreasonable to expect that only their buildings would be solely liable for the increased transit fee for the next 45 years. They add that the transit fee is dissimilar from the assessment district mechanism and

that the foregoing language did not give sufficient notice of the nature of the fee or the amount.

Whether the language provided plaintiffs adequate notice is a question of law. (See generally, *Mullane* v. *Central Hanover Trust Co.* (1950) 339 U.S. 306, 314, 319-320; *Horn* v. *County of Ventura* (1979) 24 Cal.3d 605, 616-618.) The city is incorrect in contending that we review the trial court's conclusion under the substantial evidence test. In this matter, it is necessary to decide only what is the legal effect of the evidence as found by the trial court. Having resolved any dispute in the evidence concerning what the parties knew at the time the building permits issued in favor of the judgment, the question whether this evidence constituted reasonable notice is one of law. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 290, p. 302.)

In arriving at its conclusion, the trial court relied on the evidence that the planning commission was considering a number of alternative funding mechanisms, which included a development fee, and that the commission did not intend to limit the possible mechanisms, and so included broad language in the permits. However, the trial court failed to find that this information was communicated to the plaintiffs or that the plaintiffs reasonably should have known of the planning commission's proposals. In fact, the trial court found that "there is no evidence of specific details formulated or legislation proposed . . . ." The uncommunicated intention of the planning commission is irrelevant to the issue of notice, and the trial court could not properly rely on this extrinsic evidence to support a finding of adequate notice. We therefore turn our attention to the express language contained in the building permit.

Plaintiffs argue that the language alerted them only to the possibility of a downtown-wide assessment district which applied to both new and existing office space, and

that the transit fee imposed on a limited number of property owners is not at all similar to an assessment district. They argue that the language "peak demand generated by cumulative office development in the downtown area" refers to total ridership, including all downtown office space. They further interpret the term "downtown assessment district of similar, fair and appropriate mechanism" as limiting the funding mechanisms to that which is applied on all downtown office buildings, not just on new office space. They also argue that the transit fee is not similar to the assessment district language since it singles out new buildings in a manner unlike any then existing assessment district. We agree.

The term assessment district connotes a limited geographic area in which property therein is taxed to pay for benefits of strictly local interest. (See *City Council* v. *South, supra*, 146 Cal.App.3d at p. 327.) The transit fee imposed is limited only to certain buildings within designated "downtown area." Since the entire downtown area is affected by the peak demand in ridership, it would be unreasonable to expect plaintiffs to anticipate that only a few office buildings would be covered by the funding mechanism. We do not think that the words "similar, fair and appropriate mechanism" reasonably could be construed to include the exclusive funding mechanism of the type in effect here. When a vested right is implicated, due process requires that notices be meaningful or "of such nature as reasonably to convey the required information . . . ." (*Mullane* v. *Central Hanover Trust Co., supra*, 339 U.S. at p. 314.)

Relying on *La Canada Flintridge Development Corp.* 1. *Department of Transportation* (1985) 166 Cal.App.3d 206, the city argues that it was not under any obligation to give plaintiffs notice. That reliance is misplaced. There, the reviewing court held that the Department of Transportation was not estopped from requiring the developer to pay for widening the highway after the

local city council had approved the subdivision map. The court found that the state agen could impose this condition without first raising concerns about state highways with local agencies when those highways are merely adjacent to proposed new development. (*Id.*, at pp. 219-220.) That case resolved a jurisdictional dispute between two government agencies and is inapposite to the matter before us. We conclude that the language in the building permits and the extrinsic evidence offered by the city did not reasonably place plaintiffs on notice to expect this development fee, and the retroactive application of the Ordinance is unconstitutional.

Nor do we believe that the environmental impact report gave plaintiffs adequate notice of imposition of the development fee. In the comments to the plaintiffs' draft environmental impact report, plaintiffs recognized the need for expanded transit services that their development would generate. Also, plaintiffs agreed to "contribute to funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project, *through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City.*" The italicized language demonstrates that plaintiffs were aware the city might establish an assessment district and would contribute their fair share to defray the increased transit costs. However, we cannot infer from this discussion that they could have reasonably anticipated the type of development fee enacted by the city. The environmental impact report gave plaintiffs no more information than the language in the building permits, which we have concluded was too general to support this type of exaction.

VI

Lastly, Russ Building plaintiff attacks the amount of the transit fee, contending that the methodology used and the assumption relied upon by the city's consultants

were unsupported by the evidence. The board fixed the transit fee at $5 per square foot. This was based on a June 1981 estimate of increased transit costs calculated by Bruce Bernhard of the San Francisco Public Utilities Commission Bureau of Finance. This fee was less than Bernhard's calculation of $6.57 per square foot. Prior to trial, the city retained Touche-Ross as a consultant. Touche-Ross calculated the increase in the transit costs to be $8.36 per square foot. This figure was based on a projected use over the next 45 years. The trial court found that the 45-year forecast was reasonable as it "rationally and directly related" to the estimated life of the buildings. The trial court also concluded that the assumptions and figures employed by the consultants in arriving at this amount were rationally based.

During the 10-week trial, each side presented exhibits and experts to testify about the methodology employed in calculating the transit fee. It is sufficient to state that the parties' experts differed in their approach. Whether the approach taken by the city's consultants was economically justifiable and financially and scientifically sound was a question of fact for the trial court, whose conclusion must be upheld if supported by substantial evidence. (See generally, *United Business Com.* v. *City of San Diego* (1979) 91 Cal. App.3d 156, 182.)

A

Plaintiff challenges the use of the 45-year projection, claiming that it was not possible to estimate the increased transit costs that far into the future. Plaintiff relies on the testimony of its experts who stated, essentially, that for such a long period of time there were too many variables to consider to make any reliable estimate. Naturally, this conclusion was disputed by the city's experts. While the degree of precision of the costs decreases proportionally with the length of the projection, we cannot state that such long term forecasts are in-

herently unreliable or are so arbitrary as to be mere speculation. The trial court's decision approving the 45-year term was supported by substantial evidence.

B

Next, Russ Building plaintiff argues that Touche-Ross used an improper discount rate in calculating the present transit fee. Touche-Ross applied a discount rate of 1.74 percent in arriving at the net present value of the lump sum fee levied against plaintiff. Plaintiff contends that the discount rate was too low and that it should be based on the rate for the "snapshot year" 1980-1981, the period from which the ridership data was taken. Touche-Ross used an economic forecast which estimated the discount rate over the 45-year projected term, rather than the rate for the "snapshot year." This was the only long term projection in the record, and there was testimony on both sides concerning its accuracy. The trial court found that there was a rational basis for using this method and we agree.

Plaintiff contends this figure is too low and that the discount rate for the snapshot year should have been used. We find no inconsistencies in the use of a snapshot year to predict the *amount* of increased services needed and the 45-year forecast to estimate the *cost* of those services over useful lives of the buildings. The increased usage of the transit system can be calculated to a reasonable certainty by selecting a model year, in this case 1980-1981, and extrapolating the need based on known quantities for ultimate office capacity, vehicle capacity, route structure and patronage volume.

In contrast to the future usage figure, the *cost* of those services is not reasonably ascertainable in any one year, but fluctuates with the economy. The cost for maintaining, repairing and purchasing new vehicles, and the costs of salaries and insurance, to name a few, are variable,

subject to influences outside the control of city officials, e.g., gas prices, the inflation rate, etc. Under such circumstances, it would be unreasonable to base the discount rate on a "snapshot year" since it could be a year of unusually high or low inflation and, as we note, the inflation rate has not remained the same. In arriving at the cost of the increased transit services over the projected 45-year life of the building, it is more rational to use a forecast based on historical economic trends. We find substantial evidence to support the trial court's finding.

C

Relying on *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, plaintiff also argues that the failure to include a rate adjustment mechanism is unconstitutional.[5] Plaintiff proposes the city collect an annual installment, subject to yearly recalculations of the estimated cost. Plaintiff's reliance on *Birkenfeld* is misplaced. In that case, a City of Berkley rent control ordinance required a rollback of all controlled rents to those in effect on August 15, 1971; this would become the maximum rent subject to adjustments on a unit-by-unit procedure, which the court held was too cumbersome to be effective. (*Id.*, at p. 136.) In this context, the court held that "[f]or such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions." (*Id.* at p. 169.)

There is no similarity between the method for arriving at the maximum rent allowed in *Birkenfeld* and the pro-

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[5] The Ordinance does provide that the fee should be reexamined annually to determine the amount to be levied against new buildings completed in subsequent years. (Ord. No. 224-81, § 38.6.) But this does not provide for reimbursement to owners who have already paid their share of the fee.

jected costs for increased transit services in the instant matter. Unlike the Berkeley ordinance, the transit fee was not artificially limited to one particular year, but calculated based on the expected costs over the 45-year period, taking into consideration the fluctuating market conditions and inflation rate. A fair reading of *Birkenfeld* convinces us that an annual readjustment of the transit fee is not constitutionally mandated in this instance, and plaintiff's contention necessarily fails.

D

Next, plaintiff challenges the data used in the "snapshot year."

1

First, plaintiff argues the city erred in assuming that no federal or state grants for capital improvements for expansion of the transit system would be issued. The 1984 amendment to the Ordinance provides that "capital subsidies . . . shall be assumed only when and to the extent that receipt of such subsidies is reasonably probable." (Ord. No. 224-84, § 38.5, subd. (b).) The trial court found that there exists "a debatable rational basis for concluding that State and Federal assistance for expansion vehicles and garage facilities will be unavailable . . . ."

In support of this finding, the trial court reasoned that since 1980 the city has had to use its own funds to finance all expansion vehicles. This evidence went uncontradicted. Also, the agency responsible for approving transportation grants to the region, the Metropolitan Transit Commission, treats expansion as its lowest priority, behind maintaining "existing and committed" service. While plaintiff demonstrated the city's success with obtaining capital grants, there was insufficient evidence to show that the money received was used to expand upon existing facilities. On the basis of this record, we

find sufficient evidence to support the trial court's conclusion that the board could not reasonably anticipate government funds for expanding the transit system over the next 45 years.

2

Section 38.3 of the Ordinance requires the owners of the new buildings to pay the "incremental financial burden" imposed on the Muni system, and that the fee should "measure the total incremental burdens" generated by new office development. The 1984 amendment to the Ordinance requires that costs and revenues for offpeak periods not be included in calculating the transit fee. (Ord. No. 224-84, § 38.5, subds. (e), (f).) Plaintiff argues that it is illogical not to include revenues collected from offpeak service in offsetting the total increased costs of services.

a

Plaintiff argues that the city erred in ignoring the revenues generated during offpeak periods. The argument goes that since the new office workers will surely use the Muni during offpeak hours, the revenue collected therefrom should be used to offset the cost of the increased transit services.

The evidence reveals that Muni provides offpeak service at a huge deficit. Touche-Ross, the city's consulting firm, used a marginal cost accounting approach and allocated the offpeak revenue to offpeak service, thereby reducing the deficit incurred during that period. There was no testimony that a surplus resulted from this accounting method. Thus, it does not appear that the increase in revenue duing offpeak hours has any financial impact on the cost of funding an expansion of the system to accommodate peak service use. The trial court found that this approach was rationally based, and we agree.

b

Plaintiff also argues that the city deliberately understated the revenue to be generated by fast pass use during peak hours. In its statement of decision, the trial court found: Peak operating revenue is composed of fast pass revenue and cash fare. In order to determine the average revenue per peak period trip, it is necessary to estimate the proportion of trips which are paid by fast pass versus the cash fare. Touche-Ross calculated that 54 percent of all peak period trips made by downtown workers will be paid for by fast pass, and 46 percent will be in cash. The trial court concluded that the estimate for fast pass use was a reasonable one.

Plaintiff contends that Touche-Ross mixed its data bases to arrive at an artificially lower revenue estimate from fast pass use. Touche-Ross combined the high number of fast passes sold at a discount price during 1980-1981 with the high estimate of monthly fast pass trips derived from a 1979 study in which the fast pass was *not discounted*. This, plaintiff claims, unreasonably inflated the fast pass/cash ratio and yielded underestimated revenue. We agree. In order to estimate the revenue likely to be generated by fast pass use, the calculation should be based on the cost per ride paid for at the time the ride is taken. If the Muni maintained a constant pricing policy, it would not matter which year would be used to derive the sales figures. But since the pricing of fast passes fluctuates, it is inconsistent to compare the last year's cost of riding Muni with this year's ridership. Plaintiff is correct in concluding that use of different periods artificially underestimates fare revenue derived from fast pass sales. The sales figures and the ridership use should come from the same target year.

3

Next, plaintiff challenges the application of a "transfer rate" as part of the increased costs. Touche-Ross calcu-

lated a transfer rate to account for the times a rider is likely to transfer to another line in getting to his downtown destination during the peak period. The transfer rate was calculated to be 1.39, which meant that for every 100 trips to or from downtown, there would be 139 actual rides on the various Muni lines. The city's policy, codified in Ordinance No. 224-81 section 38.3, provided that there be no increase in the level of crowding resulting from the new office space. The trial court did not question the "legislative wisdom" behind this policy and looked only to the reasonableness of Touche-Ross's calculations. The court found the calculations to be reasonable. Plaintiff claims that the transfer rate arrived at is unjustified since the "crosstown" and "feeder routes" are not operating at or beyond capacity. We agree.

Touche-Ross calculated the transit fee so that the average "load factors"—a measure of the degree of crowding—does not rise due to construction of the new office buildings. The trial court found that even though the connecting routes were not operating at capacity, it was reasonable for the city to maintain the average load factors during peak periods because (1) it could reasonably be expected that surplus space would disappear over the 45-year life of the project and (2) excess passenger capacity can be reasonably viewed as an asset to be preserved.

While it may be ideal transit policy to preserve the present load factors in the connecting routes, it is unfair to require plaintiff to bear this burden alone. While the population generated by plaintiff's buildings will likely increase the ridership on the "feeder" and "crosstown" routes, there is no evidence of increased cost to Muni to operate these lines. This is the only relevant consideration, since the fee imposed by the city must not be more than needed to provide the improvements and services required by the development. (See *Trent Meredith, Inc.* v. *City of Oxnard*, *supra*, 114 Cal.App.3d at

p. 325.) Anything beyond that would be unrelated to the development and constitute a tax. The trial court should have examined the city's policy against the applicable constitutional standards. Had it done so, it would have concluded that only necessary expansion costs could be assessed against plaintiff.

4

However, we find these errors to be harmless. (See *Warner Constr. Corp.* v. *City of Los Angeles* (1970) 2 Cal.3d 285, 301.) The difference between the transit fee as originally estimated and the amount using the methodology discussed above would result in an estimated fee well above the $5 figure imposed on plaintiff. Using the Touche-Ross analysis relied on by the trial court, a recalculation of the fast pass revenue figure would result in a $6-per-square-foot reduction, from $8.36 to $7.76. (See fn. 2, *ante.*). If the transfer rate were recalculated to exclude below capacity "policy lines," the fee would be further reduced by 81 cents per square foot; from $7.76 to $6.95; still well above the $5-per-square-foot fee imposed by the city. Accordingly, it would serve no purpose to remand this matter for further findings.

VII

In summary, we hold that the transit fee was a lawful development fee which is not governed by California Constitution articles XIII A or XIII B, and it does not interfere with plaintiffs' due process and equal protection rights. The fee is not a double tax and does not violate section 3.598 of the city's charter. Any error in calculating the fee was harmless, and the judgment in favor of the city and against Russ Building plaintiff is affirmed.

However, we conclude that the retroactive application of the transit fee to Crocker plaintiffs was unconstitu-

tional and the judgment shall be reversed as to them. Each party to bear its own costs on appeal.

LOW, P.J.

I concur:

HANING, J.

Trial court:

San Francisco County Superior Court

Trial judge:

Honorable Morton R. Colvin

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I agree with the majority that the San Francisco Transit Impact Development Fee Ordinance is valid as imposing a development fee. However, I dissent from section V, in which the majority finds the evidence does not support the trial court's findings that (1) language conditioning the issuance of the permit upon participation in a transit funding mechanism put the Crocker plaintiffs on notice that they might have to contribute for future transit service, and (2) the fee imposed by this Ordinance could reasonably have been anticipated from that language. By this finding my colleagues incorrectly preempt the fact finding function of the trial court.

I also agree with the majority, as did the trial court, that the Crocker plaintiffs acquired a vested interest to complete construction and to use their building in accordance with the terms of their permits. But there is nothing inequitable about requiring them to pay a fee to provide revenue to offset the increased costs generated by new transit riders, since it was a condition of their building permit.

The application of this fee to the Crocker plaintiffs would not violate vested rights acquired under a prior building permit. As the majority opinion points out, in comments to the Crocker plaintiffs' draft environmental impact report they themselves recognized the need for expanded transit services that their development would generate. They agreed to "contribute funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City." The Planning Commission's issuance of the building permit was conditioned upon participation in such a funding mechanism, as specifically suggested by the Crocker plaintiffs. I agree with the trial court that Crocker's own offer to contribute to a funding mecha-

nism, the language in the building permits, and the extrinsic evidence offered by the City reasonably placed the Crocker plaintiffs on notice to expect this development fee, so that its application is not truly retroactive at all.

The transit fee imposed by the Ordinance, as found by the trial court, is well within the range of possible funding mechanisms which the Crocker plaintiffs could have expected based upon the condition in their building permit. Without this condition, the building permit would not have been issued. Having obtained their building permit according to the rules, the Crocker plaintiffs now refused to play by those rules. As a result, the Crocker plaintiffs now have their cake and can eat it too—and the majority opinion supplies the frosting.

KING, J.

APPENDIX D

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER ELEVEN

No. 789 365

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
a general partnership,
Plaintiff,
vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Defendant.

No. 790 661

CROCKER NATIONAL BANK, a national banking association
and CROCKER PROPERTIES, INC., a corporation,
Plaintiffs,
vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Defendant.

[Filed Aug. 2, 1985]

TENTATIVE DECISION

BACKGROUND

In *Russ Building Partnership v. The City and County of San Francisco* (S.F. No. 780-795), this Court previously determined that the Transit Impact Development Fee ("TIDF") Ordinance is a valid exercise of local police power. Actions by Plaintiffs, PACIFIC GATEWAY ASSOCIATES JOINT VENTURE ("PACIFIC GATEWAY") and CROCKER NATIONAL BANK, and CROCKER PROPERTIES, INC. (jointly "CROCKER") against the CITY AND COUNTY OF SAN FRANCISCO ("CITY") (Nos. 789 365 and 790 661) were consolidated with the *Russ Building Partnership* case as to all issues except vested claims asserted by these Plaintiffs. The remaining issue to be decided by this Court is whether the TIDF Ordinance may be applied retroactively to PACIFIC GATEWAY and CROCKER, who obtained building permits prior to its adoption and who were in the course of construction at the time of its enactment.

DISCUSSION

CROCKER obtained approval for its downtown office project on July 26, 1979 by City Planning Commission Resolution No. 8332. PACIFIC GATEWAY's project was approved on September 20, 1979 by City Planning Commission Resolution No. 8378. Both Resolutions, No. 8332 and No. 8378, contained a "transit mitigation" condition which read as follows:

> "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, (the developer) shall participate in a downtown assessment district, or similar, fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service should such a mechanism be established by the City."

The TIDF Ordinance, requiring developers of new office buildings to pay a \$5.00 per square foot development fee, was enacted on May 5, 1981 and became effective on June 5, 1981. As originally enacted, the Ordinance applied to:

> ". . . (2) such new developments in the downtown area for which building permits were issued prior to the effective date of this ordinance where the developers had, in receiving approval by the City Planning Commission, committed themselves to pay a reasonable fee or participate in an assessment district or other financing mechanism designed to enable the City to provide and operate additional peak-period public transit service necessary to accommodate the additional number of peak-period public transit service person trips generated by office use in the new development . . ." (Section 38.4)

According to the June 10, 1982 amendment, the fee would not be payable with respect to new construction if no commitment was made and if the site had been fully prepared and the first structural element erected or the foundation completed. (See Plaintiffs' Ex. 38).

By May 5, 1981, both Plaintiffs had completed substantial construction and incurred substantial liabilities. (Stip. Ct. Ex. 2, paragraphs 6, 9). Neither Plaintiff had received a certificate of final completion and occupancy for its respective property. (Stip. Ct. Ex. 2, paragraphs 11, 12). In addition, under the Ordinance, both Plaintiffs were afforded, and so elected, the option of making installment payments over a 35-year period. (Stip. Ct. Ex. 2, paragraph 17).

It is undisputed that both Plaintiffs meet the description of developments to which the TIDF applies in the Ordinance as originally enacted and as amended. (Stip. Ct. Ex. 2, paragraph 15). This Court must decide

whether the Ordinance may be retroactively applied to the Plaintiffs without violating constitutional principles.

A retroactive law is one which relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred. *Bear Valley Mut. Water Co. v. County of San Bernadino* (1966) 242 Cal.App.2d 68, 72. A retroactive law is not per se invalid. Witkin, *Summary of California Law* (8th ed.) Vol. 5 Constitutional Law Section 282, pg. 3571. Such a law is invalid when the law operates to deprive a party of a vested right or substantially impairs such right thereby denying due process. *Id.*

It has long been the rule in this state and other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 791, *cert. denied and appeal dismissed*, 429 U.S. 1083 (1977). The vested rights doctrine protects not only the developer's right to construct, but also to use the premises as authorized by the permit. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 691.[1]

The CITY contends that while the vested rights doctrine protects a landowner from retroactive changes in

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[1] Plaintiffs argue that the TIDF violates both the vested rights and the equitable estoppel doctrines. Vested rights is a special expression of the general estoppel doctrine, not a separate rule of law. The vested rights theory is predicated upon estoppel of the governing body. *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal. App. 3d 965, 977. As a building development evolves from drawing board into reality, the vested rights rule establishes a stage of progress when reliance on governmental assurances estops the government from asserting new or different regulations. *Id.* at 977-78.

zoning and land use laws, the vested rights doctrine does not apply to "economic charges or exactions," such as the TIDF. The CITY relies on *People v. H & H Properties* (1984) 154 Cal.App.3d 894, which involved a county rent control ordinance requiring condominium convertors to make relocation payments and to pay other moving costs to displaced tenants. The plaintiff therein was a property owner who acquired a condominium conversion permit prior to enactment of the ordinance. The Court of Appeal rejected the plaintiff's vested right claim and noted that the case involved a condominium conversion project and did not fall within the line of building permit cases, as the only permit required was a minor one relating to the addition of wood siding for cosmetic purposes. *Id.* at 900. Moreover, the Court noted that, if as a result of the ordinance, "the project has lost its attractiveness, the (condominium) developers are free to pull out, and they always retain the option of holding on to the units and leasing them out." *Id.* at 902. In the present case, however, the Plaintiffs were required to and did receive building permits granting them the rights to develop their properties. Additionally, unlike the plaintiffs in *H & H*, the Plaintiffs herein had no alternative option for using their half-constructed buildings if they decided to pull out on account of the Ordinance. Therefore, the fact the Court in *H & H* did not apply the vested rights doctrine to the relocation payments is of no help to the CITY.

The CITY also relies on *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 486. In *Westfield*, the ordinance involved a special nonrecurring tax upon the occupancy and construction of new residential dwelling units and of new commercial and industrial buildings. The Court rejected the plaintiff's vested rights claims in concluding that the tax challenged was a valid business license tax upon the ongoing business of construction and not upon past and completed

transactions. *Id.* at 496. The Court stated that the "imposition of a new tax or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise. *Id.* at 494.

In the present case, however, the TIDF is not a tax on ongoing business, but is instead a development fee. The CITY argues the fact that the charge in *Westfield* was denominated a tax while the charge in the present case is denominated a fee, is irrelevant for purposes of determining the TIDF's validity under the vested rights doctrine. This argument ignores the underlying basis for this Court's upholding the constitutionality of the TIDF in *Russ Building Partnership*, as a valid exercise of local police power. The TIDF Ordinance requires the payment of a development fee as a condition for the approval of new office construction to offset burdens placed on public transportation by that new construction. (Statement of Decision, *Russ Building Partnership*, p. 7). It is not a means of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens, as are taxes. *Welch v. Henry* (1938) 305 U.S. 134. Neither is the TIDF a special tax within the meaning of Proposition 13. (Statement of Decision, *Russ Building Partnership*, p. 39). A development fee, being a condition precedent to develoment, is voluntary in nature. *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 328. Although the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. *Id.*

Even if the TIDF were considered a tax, the U.S. Supreme Court has acknowledged that the vested rights doctrine places limits upon the government's taxing power as to taxes which apply to voluntary acts. In *Welch v. Henry*, *supra*, the Court stated:

> "In the cases in which this court has held invalid the taxation of gifts made and completely vested be-

fore the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. (*Nichols v. Coolidge* 274 U.S. 531, 542; *Untermeyer v. Anderson* 276 U.S. 440, 445; *Coolidge v. Long* 282 U.S. 582). Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process . . . In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitations." *Welch, supra,* at 147.

A violation of due process can result from retroactive application of economic charges and therefore the vested rights doctrine may apply. (*See, e.g.,* cases cited in *Welch*). Thus, in the present case, if Plaintiffs could not reasonably have anticipated the imposition of a TIDF at the time they chose voluntarily to develop their properties, the retroactive application would result in a denial of due process.

When Plaintiffs completed substantial construction and incurred substantial liabilities in reliance on the permits received at the time they chose to develop, they acquired a vested right to complete construction and use their buildings in accordance with the *terms* of those permits.[2]

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[2] The fact that Plaintiffs still needed to obtain a certificate of occupany does not make Plaintiffs' rights any less vested. Once a permit is granted, it is only a matter of course that the certificate of occupancy will be granted subject to the permits. It is a fiction to view these documents separately.

See Avco, supra. These permits were subject to the aforementioned transit mitigation condition language, notifying Plaintiffs of the possible enactment of some type of funding mechanism to which they would be subjected. Absent this conditional language, the TIDF could not be applied retroactively to Plaintiffs without violating due process provisions of the Federal and State Constitutions.

The focal point of the retroactivity issue, then, is the language in the permits themselves. This Court must determine what rights the Plaintiffs acquired under their permits and particularly, whether the TIDF Ordinance falls within the transit mitigation condition language. If the TIDF Ordinance falls within the language, the Plaintiffs could have reasonably anticipated the TIDF and retroactive application would not impair their vested rights to construct and use their buildings.

In determining whether the TIDF Ordinance is included in the permit language, the Court must consider the purpose expressed and implicit in the condition's language, history and background. *See People v. Navarro* (1972) 7 Cal.3d 248, 273.

Plaintiffs contend the language of the transportation mitigation condition subjects them to a transit funding mechanism; such as a special assessment district, which would spread costs among owners of all downtown property, including owners of existing and new office properties. The CITY, on the other hand, contends that the language also embraces a funding mechanism such as the TIDF which applies only to the cost of providing additional transit service to new office buildings and which allocates the cost among owners of those new buildings.

It is undisputed that the transportation mitigation conditions were included in Plaintiffs' permits in response to an adverse environmental impact on transportation identified in the Environmental Impact Report ("EIR")

for both Plaintiffs' properties. (Stip. Ct. Ex. 2, paragraphs 4, 8). By including the language in the permits, the Planning Commission began notifying developers of the possibility that the CITY would establish a mechanism intended to mitigate such adverse impacts on transportation.

Plaintiffs suggest that at the time the Resolutions were adopted, the mechanisms being discussed for this purpose were limited to types of downtown assessment districts. However, it appears from the evidence that other possible mechanisms were being considered as well. Although there is no evidence of specific details formulated or legislation proposed, the concept of a development fee was under discussion even before Plaintiffs' permits were issued. (See Sanger Depo. at 10-13, 85-86; Lubliner Depo. at 17-18). Also, shortly after the issuance of Plaintiffs' permits, the chief and a member of the Transportation Section of the Planning Department had written a memorandum to the Mayor's office reporting that the recent approval of new office buildings were subject to the transportation mitigation condition. The memo specifically included by name CROCKER's building (Plaintiffs' Ex. 26). The memorandum described the "funding mechanisms discussed" at that time, including both "special assessment districts," aimed at all downtown and a "development fee" on new development. The memorandum also discusses Sanger's preliminary analysis of $5.00 per square foot of new development in connection with a development fee. (See Sanger's Depo. at 85-86). This memorandum, reflecting prior discussions and proposals, is indicative of the Planning Commission's knowledge and intent at or about the time it passed the Plaintiffs' Resolutions. Clearly, the Planning Commission did not intend to limit the possible mechanisms solely to assessment districts.

In light of the foregoing, this Court finds that, at the time Plaintiffs' Resolutions were passed, a variety of

possible mechanisms were being considered, including a development fee. This conclusion is further supported by the subsequent actions of the Planning Commission in Resolutions adopted after Plaintiffs' and prior to the enactment of the Ordinance. For example, Resolution No. 8543, passed in March, 1980, endorsed the concept of an ordinance establishing "reasonable fees on new non-residential commercial structures in the downtown area to help defray the additional costs of public transit resulting from occupancy of the new structure." (Plaintiffs' Ex. 28). The Resolution also described the transit mitigation provisions which the Planning Commission has required as a condition of several recent approvals of new office buildings including Plaintiffs' buildings. (*Id.*) This Resolution, and others,[3] indicates that the possibility of the CITY's enacting a development fee, as opposed to a traditional assessment district, was being more clearly defined. *See, e.g., West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 609-610.

In examining the transit mitigation condition in the Plaintiffs' Resolutions, this funding mechanism was implicit in the actual language used. The first phrase of the condition reflects its purpose:

> "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area . . ."

The words "need for *expanded* transportation services" connote that the additional transportation services would be required. The words "generated by cumulative office development" suggest that the additional services would

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[3] On July 10, 1980, the City Planning Commission approved the Doan office project. The Resolution No. 8647 had a transportation condition which read: "The project sponsor shall contribute funds for maintaining and augmenting transportation service, *in an amount proportionate to the demand created by the project* . . ." (emphasis added) (Plaintiffs' Ex. 30).

be required because of new office development. When an EIR is prepared, a cumulative impact analysis is made defining the existing buildings and the transit demand they generated as part of the status quo baseline, against which the effect of the proposed project and cumulative impacts are measured. *See* 14 Cal. Admin. Code Section 15023.5 and 15026 (1976) in effect at the time Plaintiffs' Resolutions were passed, now cited at Section 15355 and Section 15360 (1983). *See also San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal. App.3d 61, 68.

The transit mitigation condition goes on to provide for funds for "maintaining and *augmenting* transportation service . . ." The use of funds to augment transportation service contemplates the need for additional transit service as a result of new office construction. Implicit in the language is a funding mechanism in the form of an ordinance that would address the cost of providing additional transit service required by new office development.

The critical question, of course, is what type of funding mechanism did the developers agree to participate in. The condition states that the developer would participate in a downtown assessment district or "similar, fair and appropriate mechanism." While all parties agree that the TIDF Ordinance is not an assessment district, the parties are in disagreement as to whether the TIDF Ordinance is included in the range of funding mechanisms contemplated by the words, "similar, fair and appropriate."

Plaintiffs contend this language refers to a mechanism in the form of an assessment district, annual fees, or other special taxes or obligations of the sort shown in Plaintiffs' Exs. 26, 31 and 34. However, to give the condition as narrow a meaning would be to ignore the words, "similar, fair and appropriate." An interpretation which would render terms surplusage should be avoided and every word should be given some significance, leaving no

part (of the condition) useless or devoid of meaning. *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54. The language "similar, fair and appropriate" clearly was intended to include within the range of funding mechanisms to which Plaintiffs would be subjected, a mechanism which would allocate to them the marginal cost of providing additional transit service to be generated by their proposed office projects.

While the TIDF does differ from a traditional assessment district, this Court finds that the funds are within the range of the mechanism contemplated by the transit mitigation condition. The TIDF Ordinance is consistent with the purpose of the condition which addresses the adverse impact of Plaintiffs' projects on public transportation. The funds generated by the TIDF are earmarked for augmenting and maintaining the transit system in order to serve the demand created by the new development. Ordinance Section 38.7.

Plaintiffs contend that it was their good faith belief and understanding when they received their permits that they would not be subjected to a development fee such as the TIDF Ordinance. However, Plaintiffs' subjective beliefs are not controlling here. Even if Plaintiffs in good faith subjectively believed that they would not be subject to a fee such as the TIDF, these expectations do not give rise to vested rights exempting them from the TIDF Ordinance. *See Avco, supra* at 797.

At the time the Plaintiffs' Resolutions were passed, Plaintiffs understood that they would be required to pay some amount [4] as a condition to developing their prop-

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[4] Plaintiffs were told that their costs of participating in appropriate funding mechanisms would be no greater or no less than the additional costs Muni would have to incur due to additional demand generated by their buildings (Lubliner Depo. at 35-36). Since this Court has found that the TIDF is in effect less than two-thirds of the additional cost Muni can reasonably be expected to incur due

erties. This Court has previously determined that it is within the police power of local government to impose a development fee in the form of the TIDF Ordinance. (Statement of Decision, *Russ Building Partnership*, No. 780 795). The Court finds that Plaintiffs must have been aware from the transit mitigation condition language and for reasons heretofore discussed, that they would be subject to payments under any assessment district formed *or a similar fee mechanism that would pass constitutional muster.* This Court has heretofore held that the TIDF Ordinance passed constitutional muster. The TIDF Ordinance is consistent with the purpose implicit in the mitigation condition language and falls within the range of possible funding mechanisms contemplated by the parties. The fact that TIDF may impose a greater financial burden on the Plaintiffs than other funding mechanisms does not render the TIDF dissimilar. It only subjects the Plaintiffs to a greater financial burden than they might have otherwise been required to incur had the CITY chose another funding mechanism.

Stated in its simplest form, the TIDF Ordinance is similar to the condition language in that Plaintiffs are

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to additional demand generated by Plaintiffs' buildings, the TIDF is within the range of what Plaintiffs reasonably could have expected to pay. (See Statement of Decision, *Russ Building Partnership*, No. 780 795, p. 35). While Professor Cooter's testimony appears to indicate the amount to be paid under the TIDF Ordinance would be more than under an assessment district, his comparison is misleading. He assumed that in the creation of an assessment district, owners of both old and new buildings would be assessed marginal costs for providing additional transit associated with the new buildings. It would be illogical to assess owners of old buildings for the cost of additional transit service attributable to development of new buildings. Had an assessment district been formed to cover the cost of providing additional transit service attributable to new buildings with only those new buildings, i.e., the beneficiaries of that additional service being assessed, logic would suggest that the cost would be essentially the same as the TIDF. (RT 4985).

only required to pay the marginal costs for increased transit demand due to their new office construction.

Plaintiffs acquired vested rights to complete construction and use their building in accordance with the terms of their permits. However, it is well established that the rights which may vest through reliance on a government permit are no greater than those specifically granted by the permit itself. *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 866. Given the transit mitigation condition in their permits Plaintiffs were required to participate in some mechanism to be established by the CITY. To exempt Plaintiffs from the TIDF Ordinance would give them greater rights than those granted by their permits.

CONCLUSION

Absent the transit mitigation language, the TIDF Ordinance could not be retroactively applied to Plaintiffs without violating Federal and State constitutional principles of due process. However, the permits conditioning Plaintiffs' rights to develop subject to participation in a "downtown assessment district or similar, fair and appropriate mechanism . . .," and circumstances giving rise to their issuance, allow retroactive application of the TIDF Ordinance to Plaintiffs without impairment of constitutional rights.

Defendant, CITY AND COUNTY OF SAN FRANCISCO, is directed to prepare a Statement of Decision and a proposed Judgment in accordance with California Rules of Court and are awarded their costs of Court.

DATED: August 2, 1985

/s/ Morton R. Colvin
MORTON R. COLVIN
Judge of the Superior Court

APPENDIX E

California Superior Court
City and County of San Francisco
Department Number Eleven

No. 780 795

RUSS BUILDING PARTNERSHIP, a California general partnership, consisting of The Shorenstein Investment Company, The Swig Investment Company, and The Weiler-Arnow Investment Company, as partners, on behalf of itself and all other owners and developers of property within the Downtown Area defined in Ordinance No. 224-81 of the City and County of San Francisco similarly situated,

Plaintiffs,

vs.

THE CITY and COUNTY of SAN FRANCISCO, a municipal corporation,

Defendant.

No. 789 365

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE, a general partnership,

Plaintiff,

vs.

THE CITY and COUNTY of SAN FRANCISCO, a municipal corporation,

Defendant.

No. 790 661

CROCKER NATIONAL BANK, a national banking association, and CROCKER PROPERTIES, INC., a corporation,
Plaintiffs,

vs.

THE CITY and COUNTY of SAN FRANCISCO,
a municipal corporation,
Defendant.

STATEMENT OF DECISION

[Filed January 4, 1985]

INTRODUCTION

The Transit Impact Development Fee ("TIDF") Ordinance was enacted on May 5, 1981 and became effective on June 5, 1981.

The purpose of the Ordinance is to require developers of new office buildings in a defined district in downtown San Francisco, "to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway ("Muni") in serving the new riders generated by those new buildings over the life of those buildings (TIDF Section 38.3). The fee is to be collected by the City at the time a Certificate of Final Completion and Occupancy is issued for the building (TIDF Section 38.4). The initial fee was set at $5.00 per square foot (TIDF Section 38.5), and has not been changed.

The fee is to be measured by the incremental cost of providing the additional service over 45 years, the assumed life of a building (Ex. 631, p.3; Ex. 54, p.5).

There is no provision in the Ordinance for adjustment of the fee once the developer becomes obligated to pay.

The Ordinance provides that the fee is to be re-calculated once a year (TIDF Section 38.6), but the re-calculated amount only applies to new buildings which receive their Certificates after the fee has been re-calculated. On May 28, 1981, Plaintiff, RUSS BUILDING PARTNERSHIP, representing a class of over 6,000 property owners, within the TIDF district, commenced this action to have the TIDF Ordinance declared illegal on its face and as applied on the grounds that: (a) it is an unlawful special tax under Proposition 13 (Cal. Const. Art. XIII A); (b) it makes illegal appropriations within the prohibition (Cal. Const. Art. XIII B); (c) it violates due process and equal protection clauses of the United States and California Constitutions; and (d) it violates Section 3.598 of the City Charter.

An action by Plaintiffs, PACIFIC GATEWAY ASSOCIATES JOINT VENTURE ("PACIFIC GATEWAY"), and CROCKER NATIONAL BANK, and CROCKER PROPERTIES, INC. (jointly referred to as "CROCKER"), against the CITY AND COUNTY OF SAN FRANCISCO (S.F. Superior Court Nos. 789365 and 790661) were consolidated for trial with this action as to all issues except certain vested rights claims asserted in those actions.

An action by MAIDEN LANE ASSOCIATES was commenced against the CITY AND COUNTY OF SAN FRANCISCO (S.F. Superior Court No. 780795). It was consolidated for trial with the class action and the PACIFIC GATEWAY-CROCKER case, and by stipulation entitled "Order Severing Certain Complaint in Intervention Causes of Action" filed May 2, 1984, MAIDEN LANE ASSOCIATES' Second, Third, Fourth, Sixth and Seventh Causes of Action shall be bound by the final determination of the issues in consolidated actions, RUSS BUILDING PARTNERSHIP, et al. v. THE CITY AND COUNTY OF SAN FRANCISCO, No. 780795, PACIFIC GATEWAY ASSOCIATES JOINT VENTURE v. THE

CITY AND COUNTY OF SAN FRANCISCO, No. 789365, and CROCKER NATIONAL BANK, et al. vs. THE CITY AND COUNTY OF SAN FRANCISCO, No. 790661.

Pursuant to stipulation entitled "Stipulation Re Complaint in Intervention" filed May 1, 1984, MAIDEN LANE ASSOCIATES' Eighth and Ninth Causes of Action were severed and pursuant thereto, this Court specifically reserves the jurisdiction over the final disposition of the Eighth and Ninth Causes of Action pending administrative determinations regarding retail conversion credits.

The RUSS BUILDING Plaintiffs are a class consisting of all owners of property in that part of downtown San Francisco included in the Transit Impact Development Fee District ("TIDF Ordinance"), Section 38.1, subsection (d). Plaintiffs, "PACIFIC GATEWAY" and "CROCKER" have built new office buildings within the Transit Fee District and have opted out of the class.

On May 5, 1981, the Board of Supervisors of the City and County of San Francisco enacted the Transit Impact Development Fee Ordinance; Ordinance 224-81 (codified as S.F. Admin. Code Section 38.1-38.18 (Intervenor's Ex. 12)).

On May 15, 1984, the Board of Supervisors amended the TIDF Ordinance; Ordinance 224-84 (Ex. 587). The amendments did not change the findings of the TIDF except with respect to retail and other uses. (1984 Amendment, Section 38.5).

The 1984 Amendment added certain "principles" under which the cost of the fee is designed to reflect are to be calculated (Sections 38.5 (a) through (g)). Those "principles," in effect, adopted the methodology of Touche-Ross, an accounting consulting firm hired after the commencement of this litigation by the CITY. (RT 4226-4231, 4231, 4271-72 (Firestone)).

FEDERAL AND STATE CONSTITUTIONS AND STATUTES

"The Police Power is the inherent reserve power of the State to subject individual rights to reasonable regulations for the general welfare (citation). One of the most common subjects of local Police Power regulations—is the area of land use and development (citation)." *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 C.A.3d 317, 325.

It has long been settled that the Police Power extends to objectives in furtherance of the public peace, safety, morale, health and welfare and is not a circumscribed prerogative but is elastic and, in keeping with the growth of knowledge and the belief in the populations' mind of the need for its application, capable of expansion to meet existing conditions of modern life. *Birkenfeld v. City of Berkeley* (1976) 17 C.A.3d 116, 129.

One of the most common subjects of local Police Power regulations is in the area of land use development. *Condit v. Solvang Mun. Improvement District* (1983) 146 C.A.3d 997. Whether there has been a reasonable exercise of the Police Power is a question for the Court. *Liberty v. California Coastal Commission* (1980) 113 C.A.3d 491, 502. Where ordinances or bylaws have been enacted pursuant to competent authority, they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold ordinances and bylaws unless they manifestly transcend the powers of the enacting body. *Galligan v. City of San Bruno* (1982) 132 C.A.3d 869, 874. Unless the challenged provisions are palpably unreasonable, arbitrary, or capricious, they will be upheld as a valid exercise of the Police Power. *Brex v. City of San Rafael* (1979) 92 C.A.3d 47, 50. An ordinance will be upheld under the Police Power unless there is a complete absence of even a debatable rational basis for the

legislative determination. *Birkenfeld, supra*, p. 161. "The Courts have nothing to do with the wisdom or expediency of measures adopted . . . and will not substitute their judgment or notions of expediency, reasonability, or wisdom . . . ." *Carlton Santee Corp.* v. *Padre Dam Mun. Water District* (1981) 120 C.A.3d 14, 28.

At the outset, this Court must determine whether the TIDF is a regulatory fee or a development fee. Where an assessment is classified as a regulatory fee, the Court must make a factual determination as to whether or not such fees were greater than the reasonable cost of the regulatory activity for which they were imposed. *Mills* v. *County of Trinity* (1980) 108 C.A.3d 656. The significance of this cost-benefit analysis is this: if revenues collected exceed the cost of regulatory fee, the fee may be a "special tax" under the California Constitution, Article XIIIA, Section 4. *County of Fresno* v. *Malmstrom* (1979) 94 C.A.3d 974. If the fee extracted is a "special tax," that extraction must be submitted for voters approval and requires a two thirds vote of the electorate. *Government Code Section 50077.* Where a fee is classified as a development fee, the assessment must reasonably relate to the protection of the public health, safety and general welfare. *Ayres* v. *City of Council* (1949) 34 C.A.2d 31. In short, the assessed fees must be related to the increased disbursements required of the governmental body to provide improvements and service resulting from the new development. *Trent Meredith, Inc., supra.*

No case has ever explicitly attempted to define either a development fee or a regulatory fee, *County of Fresno* v. *Malmstrom, supra,* nor will this Court attempt to do so. The TIDF is a development fee that requires the payment of money as a condition for the approval of new office construction to offset burdens placed on public transportation by that new construction. For other examples of development fees, see *Trent Meredith, Inc.* v. *City of Oxnard, supra; Associated Home Builders* v. *City of*

Walnut Creek (1971) 4 C.A.3d 63; *McLane Western No. 1* v. *County of San Diego* (1983) 146 C.A.3d 772; *Kaloydjian* v. *City of Los Angeles* (1983) 149 C.A.3d 690; *City Council* v. *South* (1983) 146 C.A.3d 320; *Norsco Enterprises* v. *City of Fremont* (1976) 54 C.A.3d 488.

California courts have long upheld the validity of ordinances which require developers to mitigate the effects of development on municipal services. The seminal case is *Ayres* v. *City Council* (1949) 34 C.2d 31. In *Ayres*, Los Angeles approved Plaintiffs subdivision application, but conditioned its approval on the dedication of a segment of the land to public use. The Court held that the conditions imposed were "reasonably related to the protection of the public health, safety and general welfare" and were therefore a valid exercise of the police power. *Ayres, supra,* at 38. In *Scrutton* v. *County of Sacramento* (1969) 275 C.A.2d 412, the Court upheld an ordinance empowering the imposition of exactions on developers. The Court relied on *Ayres* for the proposition that conditions imposed on development "reasonably conceived to fulfill public needs emanating from the landowner's proposed use" were constitutional where the conditions were designated to protect against deleterious effects of the development or to meet public service demands generated by the development. *Scrutton, supra,* at 421. Following this line of reasoning, the exaction of fees as a condition to development has been upheld in a variety of situations: In *Associated Home Builders, Etc., Inc.* v. *City of Walnut Creek* (1971) 4 C.3d 633, the Court upheld a requirement of dedication of land for park or recreational purposes of payment as an in lieu fee as a condition of subdivision map approval. In *Norsco Enterprises* v. *City of Fremont* (1975) 54 C.A.3d 488, a substantial fee for park and recreational purposes as a condition for condominium conversion was upheld. In *Builders Association of Santa Clara* v. *Superior Court* (1974) 13 C.3d 225 and *Trent Meredith, Inc.* v. *City of Oxnard* (1981) 14 C.A.3d 317,

an ordinance requiring the payment of a fee or the dedication of land for additional school construction as a condition for approval of development was upheld. In *McLain Western #1* v. *County of San Diego* (1983) 146 C.A.3d 772, the Court upheld an ordinance requiring that the developer pay substantial fees to offset the burdens placed on the school system as a result of new development. In *Kalaydjian* v. *City of Los Angeles* (1983) 149 C.A.3d 690, the Court upheld an ordinance which imposed a fee on developers who convert apartments to condominiums to pay for the cost of relocating tenants displaced by the conversion.

Courts have upheld a variety of ordinances which condition the right to develop upon the developer in some way mitigating the burden created by the development. Judicial concern is directed to questions of whether the ordinance is reasonably related to a legitimate governmental objective.

The legitimacy of a governmental objective is limited only by the scope of the police power authorized by Article XI, Section 7 of the California Constitution; that is, the objective must be "reasonably related to promoting the public health, safety, comfort and welfare." *Sunset Amusement Co.* v. *Board of Police Commissioners* (1972) F.C.3d 64, 72. Development and maintenance of an adequate public transportation system has been found to be an important objective reasonably related to the general welfare by the California Legislature. *Gov't Code Sections 14000, 14000.5.* In these code sections, the Legislature addressed this issue and found that there is a need for improved transportation systems to meet increasing demand and that a goal of the State is to provide adequate, safe and efficient public transportation facilities. See also *San Franciscans for Reasonable Growth* v. *City and County of San Francisco* (1984) 151 C.A.3d 61.

Since the objective of providing adequate public transportation is a legitimate governmental objective, this

Court must determine whether there is a sufficient nexus between the stated objective and the extraction of TIDF fee. The TIDF specifically states that the funds may not be used except to meet the increased demand for peak-period transit facilities created by new office development. (TIDF Section 38.7). Since the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices, there is a sufficient nexus. Indeed, authorities discussed above have not required the degree of specificity provided by the TIDF. No infirmity arises merely because the general public would share the benefit of the contributed resources or because the exaction creates facilities which will not directly benefit the development. *Associated Home Builders, Etc., Inc.* v. *City of Walnut Creek* (1971) 4 C.3d 633, 640.

The resources need only be used to combat the general problem created by new development. *Liberty* v. *California Coastal Commission* (1980) 113 C.A.3d 491. Moreover, the relationship between the harm sought to be corrected or prevented by the condition and the development on which the condition is imposed need not be direct or subject to precise measurement. *McLain Western #1* v. *County of San Diego* (1983) 146 C.A.3d 772, 778. In *McLain, supra,* for instance, the Court held that it was irrelevant to the validity of a fee for interim school facilities caused by new development that a particular development would generate little demand for schools since it is not unreasonable to consider the growth of the area, present and future, in determining the need for schools caused by land development. In *Associated Home Builders, supra,* the Court found a sufficient nexus in that new subdivisions, in general, use up remaining open space and bring in new residents, creating more demand for parks.

This Court concludes that if the extraction of the TIDF is *both* rationally based and reasonably related to the

permissible legislative objective of mitigating the effects of the need for more public transportation generated by new downtown office development, the constitutionality of the Ordinance must be upheld.

This Court's conclusion also disposes of Plaintiffs' taking clause challenge to the TIDF. There is no deprivation of property without just compensation within the meaning of the federal or state constitutions so long as the development fee is reasonably related to a legitimate governmental objective and addresses a need created at least in part by the new development. *Associated Home* Builders, supra, 4 Cal.3d at 637-640 & nn. 5 & 6.

EFFECT OF THE 1984 AMENDMENT
TO THE ORDINANCE

The Court finds that the 1984 Amendment was a clarification by the Board of the methodology used and to be used in calculating marginal costs for each gross square foot of new office construction in the downtown area. The Amendment does not effect the substantive rights of the parties nor does it effect the amount of the fee to be extracted. Section 38.3 of the Ordinance has not been amended and provides: "It is the purpose of this Ordinance to require developers of new development in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway for both initial capital outlay for the acquisition of rolling stock and the construction of facilities and for the long-term operation, maintenance and replacement of those facilities once they are in place . . . . The rate making provision established by this Ordinance is intended to identify and measure the total incremental burden imposed on the City's Municipal Railway by virtue of the demands created by office use . . . . This fee will enable the City to pay the capital and operating costs of all additional peak period public transit service

in the downtown area necessitated by office use in new development."

As a general rule, a Court must apply the law in effect at the time it makes its decision. *Gregory v. City of San Juan Capistrano* (1983) 142 C.A.3d 72, 78. The effect of an amendment to a law is to render the preexisting law inapplicable. *Selby Realty Co. v. City of San Buena Ventura* (1973) 10 C.A.3d 110, 125. In *Gregory*, the Plaintiffs challenged the constitutionality of the Mobile Home Rent Control Ordinance. The Defendant City amended the Ordinance several times during the trial and once after the trial while the appeal was pending. The Court of Appeal held that the Ordinance, as amended, was the one to be reviewed. Absent clear legislative direction, the burden of interpreting unclear statutory language falls on the judiciary. *Birkenfeld v. City of Berkeley* (1976) 17 C.A.3d 129. However, it is preferable for the legislative branch to declare clearly and unequivocally what it meant so that the Court can make a determination on the issues. *Rodriquez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626. As in *Gregory, supra*, the Court must focus on the Ordinance as amended in 1984 and make a determination on the constitutional issues.

The language of the amended Ordinance is entirely consistent with the original Ordinance. It clarifies language which may have been ambiguous and it addresses certain elements of detail as to which the original Ordinance was silent. It, in no respect, alters any of the principles or basis underlying the transit fee nor does it direct specific calculations inconsistent with those principles and purposes.

ANALYSIS

As indicated above, Touche-Ross was retained by the CITY and rendered a study to the General Manager of the Public Utilities Commission charged with implement-

ing and enforcing the legislation pursuant to Sections 38.6 and 38.9 of the Ordinance. The study was in turn presented to the Board of Supervisors as required by Section 38.6 of the Ordinance. (See Ex. 508-509). Following that submission, the Board passed resolution #880-83, approving the Touche-Ross study. (See Ex. 53; Court Ex. 1). The Board again approved the Touche-Ross study as revised February 22, 1984. (Ex. 54; 1984 Amendment Section 4). It further accepted as reasonable the corrected $6.57 Bruce Bernhard computation. (See Ex. 39).

In order to determine whether the Touche-Ross methodology adopted by the Board was consistent with purposes and intent of Ordinance *and* is rationally based, the Court will discuss separately each of the so-called "principles" encompassed within Section 38.5 (a) through (g).

a) (*Determination of peak period*): Plaintiffs do not contest the principles stated in this subsection other than to contend that this subsection and all following subsections contained in Section 38.5 adopted the Touche-Ross methodology. Defendant contends that the Board could rationally conclude that the Muni operated at vehicle capacity during the entire peak period, as defined by Touche-Ross and that additional vehicles would be needed to add runs to meet new demand generated by new downtown office space. The Court finds that with the exception of policy driven cross-town lines,[1] there is a rational basis for such a finding.

Touche-Ross defined the peak period as follows:

Motor Coach	Trolley Coach	LRV
AM 6:50—9:10	7:20—9:10	6:30—9:30
PM 4:00—6:10	3:50—6:10	3:50—7:10

[1] The Court concludes that there was no rational basis for inclusion of policy driven cross-town lines. The effect of this exception will be discussed, *infra*.

Muni used the same definition used by Touche-Ross as Muni's official definition of peak period for purposes of its reporting to the Urban Mass Transportation Administration (UMTA). UMTA requires periodic reporting of transit operations data by Federal grantees; included among the required data is information specific to the peak period. Each operator must under general Federal standards determine its own peak period. (RT 13-19 (Firestone)). Muni and UMTA mutually agreed upon hours which met that description for Muni. RT 1440-1442 (Firestone)). Touche-Ross found these hours suitable for its use. (RT 17-18 (Firestone)).

The Court concludes that Muni operated at vehicle capacity in 1980-1981 because there was a rational basis for finding that during the peak period, Muni's entire fleet was either (a) in operation; (b) undergoing service; (c) held back for reserves; or (d) awaiting deployment later in the peak period. (RT 1675-82, 4174-84, 4217 (Firestone); RT 1941-42 (Hudak)).

The Board could rationally conclude that the peak period should not be shortened even though there is passenger capacity in the "shoulder" of the peak because it is neither feasible nor desirable to have a Muni line operating at passenger capacity except in the "peak of the peak." To do so would tend to concentrate travel in the peak of the peak to an even greater degree and would slow down Muni schedules even further, thereby requiring additional Muni trips. (RT 4403-4406-11, 4413-19 (Geissenheimer)).

Accordingly, the Court concludes that subsection (a) is rationally based and consistent with the intent and purpose of the Ordinance.

b) (*Calculation of subsidies only when receipt is reasonably probable*):

The Bernhard and Touche-Ross studies assumed that Muni would not receive any Federal or State capital

grants for providing incremental service to downtown office workers in 1981 and for the following 45 years (Ex. 561, p. 2; Ex. 54, p. 5).

Plaintiffs contend that the assumption that Muni would receive no capital subventions for 45 years was irrational and unreasonable and such an assumption was and has been incorrect before, during and after the enactment of TIDF. (RT 3095-96 (Dineen)). They argue that the Federal Government has been funding transportation systems since the early 1960's and capital funding was always a part of the program. (RT 2208-09 (Cherwony)). They contend that the City itself recognizes that Muni's capital projects over the past 20 years have been 80% funded by Federal funds and 20% by "local" funds—predominantely State money. (Ex. 8, p. 12). They further contend that it was irrational for Bernhard and Touche-Ross not to include in the 1980-81 snapshot capital grants already received or reasonably committed. (RT 3095, 3109 (Dineen)). That on June 5, 1981, the very day that the TIDF Ordinance became effective, the City requested Federal funding for an additional 15 LRVs (Ex. 12); and subsequently, an additional 25 LRVs were funded through State grants. (RT 956 (Stoll)). And finally, that Federal capital costs are available to Muni for expansion, not just replacement. (Ex. 9, p. 115; Ex. 14B, p. J.25; RT 377 (Bernhard); RT 246 (Shao); Ex. 7-A, p. 204; Ex. 78, Ex. 9, p. 118).

It is clear that Muni has received funding for its various projects from outside sources. However, it is Plaintiffs' burden to show that no rational basis exists for concluding that no State and Federal capital subsidies will be available in the next 45 years to provide additional peak period service due to new downtown office workers. Plaintiffs' evidence is impressive. However, the Board of Supervisors could rationally conclude that governmental assistance will not be available to fund expansion of service to meet the demands of new down-

town office buildings. (Ex. 54 at 5; RT 3420 (Dineen); RT 2213 (Cherwony)). The Court is of the opinion that there exists a debatable rational basis for concluding that State and Federal assistance for expansion vehicles and garage facilities will be unavailable, in that: the Metropolitan Transit Commission ("MTC") is a regional planning agency which contracts all outside funding requested by transit operators in the Bay Area. (RT 1024-25 (Stoll); RT 2352 (Dahms)); MTC's highest priority is to fund "existing and committed" transit services—a specific level of services which was in place or planned as of July 1, 1979. (RT 1210-11 (Stoll); RT 1270 (Dahms)); that funding of vehicles and facilities necessary to expand service beyond the existing and committed service is MTC's lowest priority. (Ex. 562; Ex. B at p. 2; RT 1271 (Dahms); RT 999 (Stoll)); and MTC applies the same priority in considering application for funds which it would distribute directly as it does in considering applications which would be made to Federal or State agencies for funds. (RT 999, 1024-25 (Stoll); RT 2352 (Dahms)). Muni may not make an application to a State or Federal agency unless said application is approved by MTC. (RT 1024 (Stoll)). Since 1980, the City has had to use its own funds to finance all expansion vehicles—those vehicles not included in the "existing and committed" formula and has purchased some vehicles required to maintain existing levels of service. Ex. 559, RT 2332-33, 2335, 2338-39 (Dahms); RT 977, 1039-46 (Stoll)). The Board could have concluded that even if MTC were to allocate to Muni all money for the vehicle purchases which appear on MTC's "out-year" priority lists—lists of grants planned but not yet approved through 1988, that money would be insufficient to even purchase the necessary replacement vehicles to sustain existing service with no money available to purchase expansion vehicles. (Ex. 533; RT 1055-57 (Stoll)). The Board could reasonably have concluded

that MTC does not anticipate having Federal funds available for expansion of service in the Bay Area because Section 9 of the Surface Transportation Act (49 U.S.C. Section 1607a), which is intended to be the source of routine vehicle expansion, will not stretch beyond the region's replacement needs. (RT 2311, 2366 (Dahms); RT 999, 1096 (Stoll)). There is evidence that it is MTC's planning assumption that over the next 15 years there will be insufficient Federal grants, even to sustain existing service, let alone subsidizing expansion. (RT 2363-64 (Dahms); RT 452 (Bernhard)).

The Court concludes Section 38.5(b) is consistent with the legislative purpose under Section 38.3 of the Ordinance and is rationally based. The TIDF is to be set at an "actuarially sound level to insure" sufficient proceeds. (TIDF Ordinance Section 38.5). Without a reasonable assurance that outside capital funding would be available, a fee that included an offset for such funding would not be "actuarially sound" and would not "insure" that the City would have the funds to purchase vehicles made necessary for new downtown office space.

c) (*No increase in the level of crowding*): Plaintiffs contend that Section 38.5(c) defines a cost to exist where there is no cost in effect. Further, that this subsection is inconsistent with the Ordinance's findings, purposes and intent. The foundation of this argument is that incremental passengers boarding buses that have sufficient capacity do not in fact add incremental or marginal costs. Plaintiffs further contend that the numbers that fall out of the Touche-Ross methodology adopted by the Board would in effect replicate the entire transit system over a period of years, which is irrational and contrary to the intent of the Ordinance. As previously noted, it is not the function of the Court to second-guess legislative wisdom. This Court's review begins and ends with a determination as to whether there exists a rational basis for the Touche-Ross methodology.

Muni's maximum "capacity" expressed in terms of an average load factor was 1.5 for its rubber-tired fleet and 2.0 for LRVs in 1980-81. (Ex. 517). The evidence discloses that these load factors translate into extremely crowded vehicles and that the level of crowding was tolerated in 1980-1981 only because Muni lacked resources to improve that condition. (Ex. 517; RT 1222, 1239-40 (Stoll)). Since 1980-1981, Muni has revised its standard downward for its rubber-tired fleet to an average load factor of 1.25 for the peak hour (i.e. the one hour during the peak period with the highest load factor) and 1.36 for the peak 15 minutes for trolley and motor coaches. The peak hour average load factor standard for LRVs is 1.62. (1984-1989 5-year plan, p. 18, 61; Ex. 517; Ex. 10 at p. 60-62, 121). The Board could have concluded that lower load standards are desirable because, in part, it would increase passenger comfort, allow Muni to adhere to schedules, help ease traffic congestion by encouraging drivers to use public transportation and lessen wear and tear on vehicles. (Ex. 517; 515 at p. 5; 594; RT 4413-22 (Geissenheimer)). It is the expressed policy of the City and County of San Francisco and the Public Utilities Commission that construction of new office buildings should not result in increasing average load standards on Muni lines during the peak period. (TIDF Ordinance Section 38.5(c); Ex. 587; 1984-1989 5-year plan at 61, appendix c; RT 1463-64, 1467, 1526-27, 1804, 1830, 4185 (Firestone); RT 2053, 2064 (Stamm)). The Touche-Ross methodology is consistent with this policy because it provides Muni sufficient money to purchase vehicles to maintain (but not to reduce) existing average load factors. (RT 1696, 4520-22 (Firestone); RT 4400 (Geissenheimer); RT 2234 (Cherwony); Ex. 45 at 4). Muni's average load factors indicate that, under any standard, Muni is extremely crowded and that its lines that are scheduled for peak period demand, both radial and cross-town, with the exception of policy lines, are operating at or in excess of capacity, whether one considers the peak hour or the

peak 15 minute period. (Exs. 576A-576F; 590; 591). The Board could have reasonably concluded that even if there were "excess capacity" on certain crosstown demand driven lines or in the shoulder of the peak period, that that capacity would disappear at some point over the course of 45 years as new downtown office space is developed. (RT 1945-46, 1948-50 (Hudak); RT 3401-02, 3405-06, 3425-27, 4716 (Dineen); RT 2236-41, 2254 (Cherwony)). The Board could have viewed excess passenger capacity as an asset in that no system in the United States, with the exception of New York City, utilizes a higher percentage of its peak period passenger capacity than does Muni. (RT 4704 (Dineen)). Charging incremental costs of providing additional peak period service for both radial and cross-town lines (with the exception of policy lines), to new downtown office development is rationally based. (Ex. 587; RT 1463-64, 1467, 1526-27, 1804, 1830, 4185 (Firestone); RT 2053, 2064 (Stamm)). The Court concludes that inclusion of incremental costs for policy driven cross-town lines has no rational basis in that there was no evidence before the Board nor is there any evidence that said lines would be likely to reach capacity over the next 45 years. However, notwithstanding that fact, the Ordinance is not rendered unconstitutional either on its face or as applied. Legislative precision is not required. *McLain Western #1 v. County of San Diego* (1983) 146 C.A.3d 778. There still remains a reasonable relationship between the fee extracted and the lawful objectives of the Ordinance. Further, elimination of incremental costs of policy lines and the adjustment of transfer rates would reduce the City's square foot cost by only \$.81, from \$8.36 to \$7.55. (RT 4810 (Firestone); see also RT 4238-39 (Firestone)). Maintaining or reducing the level of crowding is a permissible legislative interest in that, among other things, it would encourage greater utilization of public transportation by the public and affords greater safety.

d) (*Cost of electricity*): Plaintiffs contend that the P.G.&E. rate (the opportunity cost) is an opportunity of the City, not the Muni. They contend that this is not consistent with the Ordinance's purpose in calculating the total incremental burden on the Municipal Railway. That is, the Ordinance does not direct that the total incremental burden to the City be calculated, only Muni's. In enacting subsection (d), the Board adopted both the Touche-Ross and Bernhard methodology, and could rationally conclude that the opportunity cost reflects lost revenue which results when additional power is consumed by Muni and is therefore made unavailable for sale to customers at P.G.&E. rates. Accordingly, the Court concludes that it was consistent with the purpose and intent of the Ordinance and rationally based.

e) (*Exclusion of off-peak cost and revenue in calculating TIDF fee*): Plaintiffs contend that principles of marginal accounting required that such off-peak cost and revenue be included and that to ignore the existence of costs and revenues generated by the use of the Muni during off-peak hours is irrational. In essence, they contend that although a tax need not necessarily be reasonable, a fee must. Muni incurs substantial cost in providing off-peak service, which operates at a huge deficit. (Ex. 54). The Board could rationally conclude in order to carry out the purpose and intent of the Ordinance, that it should allocate costs and revenue associated with off-peak trips to the off-peak period, thereby permitting Muni to recoup a portion of the loss incurred in providing that off-peak service. (RT 4135-36 (Firestone)). In performing a marginal cost accounting, it becomes necessary to define the scope of the subject accounting and the peak period is an appropriate boundary to draw. (RT 1437; 1738-40 (Firestone)). At best, the record discloses a conflict of evidence as to whether the marginal cost accounting in the Touche-Ross and Bernhard methodology is a preferable one. As such, this Court may not substitute

its judgment for legislative wisdom. *Carlton Santee Corp. v. Podre Dam Muni. Water District, supra*, at p. 28. Accordingly, the Court finds that subsection e carries with it a debatable rational basis.

f) (*Peak period revenue assumed to increase at the same rate as peak period operating costs*): Plaintiffs do not seriously question this aspect of subsection (f). The primary objection relates to the fast pass/cash ratio revenue determination to be discussed infra.

The Board could rationally conclude that Muni peak period operating revenues would rise in proportion to increases in operating costs. The percentage of operating costs which Muni has been able to recover from revenues (fare revenue recovery ratio) has fallen dramatically from approximately 90% in the mid-1950's to approximately 30% in the mid-1970's. (RT 1720 (Firestone); RT 3980 (Stamm). In the mid-1970's, the fare revenue recovery ratio stabilized in the low 30% range after the passage of AB1107. (RT 3980 (Stamm); RT 1720 (Firestone); RT 1266 (Dahms)). AB1107 is a State funding program which makes operating assistance available to transit properties in the Bay Area so long as those properties recover 33% of their operating costs from fare box revenues. AB1107 funds are an important source of operating assistance for Muni and it is reasonable to assume Muni will not sacrifice that source, if possible. (RT 3980 (Stamm)). In 1980-1981, AB1107 provided more than 30% of Muni's operating assistance. Absent the artificial floor imposed by AB1107, Muni's fare revenue recovery ratio would have fallen even further. If anything, Muni's fare revenue recovery ratio is likely to decline in the future. This is due to historical trend and the fact that in 1984, AB1107 was amended. Muni is now eligible for AB1107 funds even if 33% of operating expenses are not recovered through the fare box so long as the difference is made up out of other local revenues. (Public Utilities Code Section 29142.5. Ex.

582; RT 3982-83 (Stamm); RT 1717-18 (Firestone)). If the City, as it now may, allows fare box recovery ratio to fall even further, then Touche-Ross may well have over-estimated the amount of operating revenue, which will be collected in the future and correspondingly under-estimated the net cost of providing the service. (RT 1717-18 (Firestone)).

g) (*Fast pass/cash fare calculations*): Plaintiffs contend that Touche-Ross invalidly mixed data from different years in a manner which artificially inflated the percentage of trips taken by fast pass as well as the number of trips taken by the fast pass, which would result in under-stating revenues. They argue that Touche-Ross used the temporary discount fare structure of 1980-1981 to derive an artificially high number of fast passes sold and obtained the number of trips per fast pass from the convenience fare structure that had existed prior to 1980-1981; that these are the highest two numbers that the respective fare structures would create; that Touche-Ross then multiplied these two numbers together to calculate a fast pass to cash ratio of 53.68% fast pass and 46.32% cash.

The Court finds that the Board of Supervisors could rationally conclude on the basis of the Touche-Ross Study, (Ex. 54), that the present value of operating revenues for one incremental peak period trip per year for 45 years measured as of 1980-1981, was $7.23 because there is at least a debatable rational basis for each of the following:

1. Peak period operating revenue is made up of two components: fast pass revenue and cash fare. (Ex. 54 at p. 22). Although the actual 1980-1981 price of a fast pass and cash fare is known, in order to determine the average per peak period trip, it is necessary to estimate the proportion of trips which are paid by a fast pass as opposed to cash fare. The calculation in the Touche-Ross

Study, (Ex. 54, p. 19-20), demonstrates that approximately 54% of all peak period trips made by downtown workers will be paid for by fast pass, 46% by cash fare. That estimation of fast pass usage is a reasonable one. (RT 1702, 1705-08 (Firestone)).

2. There is no more reliable estimate of the fast pass percentage. The 31% figure which Plaintiffs use does not reflect peak period commuting habits of downtown workers and is based on wholly different fare structures, which were in effect in 1980-1981. Reliance on that number would overstate revenue. (RT 1992-93 (Hudak)).

3. Confirmation of the Touche-Ross methodology may be found both in the fact that it is known that the fast pass percentage in 1980-1981 must have been a minimum of 50.3% for the entire day and would have been even higher during the peak period. (Ex. 570). Moreover, the only actual data available was recorded in 1984 which shows that 54% of all those boarding a LRV during the peak period between West Portal and Embarcadero Station used a fast pass as opposed to cash. (Ex. 577).

4. The most reliable estimate of the average number of total trips taken by each fast pass holder is 57 trips per four week period. That number derived from the Gruen, Gruen & Associates' survey yields an average revenue per fast pass trip of $.25.9. (Ex. 54 at p. 21).

5. Although fast pass usage will vary depending on the fare structure in effect at any given time, it cannot be concluded that the fare structure in effect in 1980-1981 was inappropriate. The purchaser of the fast pass in that year would "break even" by taking at least 32 rides. After the TIDF Ordinance was enacted, the fare structure was changed so that the break even point was 40 rides. However, it has recently been revised again so that the so-called "discount pass" with a break even point of 33 rides will be reinstated. (San Francisco Public Utilities Commission Resolution 84-0331 (1984) and Board

of Supervisor's Resolution No. 706-84 (1984), which the Court judicially notices).

6. Use of a 31% fast pass figure seriously distorts the revenue calculation resulting in an unsupportable conclusion that virtually each off-peak trip in 1980-1981 must have been paid for by a fast pass. (Ex. 70 at p. 22; Ex. 519).

7. The Touche-Ross revenue calculation understates actual revenue by a significant amount because it assumes that every passenger will pay a fare. In fact, there is a significant amount of fare evasion experienced by Muni that has not been factored into the numbers that fall out of the Touche-Ross Study. (Ex. 538 at p. 108-17; RT 4231-32, 4235, 4242 (Firestone); RT 2008, 2010 (Hudak); RT 2181 (Cherwony)).

In addition to the so-called "principles" enumerated in Section 38.5 discussed above, the Touche-Ross methodology adopted by the Board assumes further:

1. That the transfer rate was correctly calculated from adequate data;

2. That the trip generation rate was correctly calculated;

3. That the trip generation rate and transfer rate calculations are reasonable estimates for the next 45 years.

4. There is a rational basis for the real interest rate forecast in the Touche-Ross report; and

5. There is a rational basis for making a 45-year projection identifying and measuring the total incremental burdens imposed on the City's Municipal Railway during the peak period by virtue of demands created by office use in new development in the downtown area.

Was the Touche-Ross transfer rate correctly calculated from adequate data?

The transfer rate was obtained from the Barton-Aschman report which in turn relied upon survey data ob-

tained by Recht Hausrath. (See Barton-Aschman trip generation study, Ex. 54, p. 1-12). The Recht Hausrath survey was conducted for purposes of the downtown Environmental Impact Report ("EIR"). The survey contained more extensive and reliable information than is usually available. (RT 3770 (Gibson)). Touche-Ross and the Board could conclude, based upon the evidence before it, that the data was adequate in order to correctly calculate the transfer rate, that is, the number of transfers a rider would take from crosstown lines, and in some cases from radial lines, to get to their downtown destination during peak period.

Was the trip generation rate correctly calculated?

Plaintiffs contend that an appropriate trip generation rate is .307. Touche-Ross found that the annual linked trips per square foot of office space was .64. Plaintiffs base their contention upon their reading of the 1983 guidelines published by the Department of City Planning for use in the EIR. (Ex. 581 at p. 14). The Court has reviewed the record and it notes that there is no expert testimony supporting the Plaintiffs' approach nor attacking the Barton-Aschman trip generation rate. The Board could conclude, based upon the evidence before it, that Barton-Aschman correctly calculated the trip generation rate on the basis of adequate data and that if the 1983 EIR guidelines were correctly used, that would produce a result almost identical to Barton-Aschman's trip generation rate. (Ex. 54, appendix d; RT 3738-43 (Follette)). Survey data from the South of Folsom area included in the downtown area was not used since in the judgment of Barton-Aschman that data was unrepresentative. (RT 2969 (Follette)). The evidence discloses that the C-3 District yields a substantially higher trip generation rate than does the South of Folsom area. There is no evidence in the record, however, that such would hold true for more than the short term and there is uncon-

tradicted evidence that it would not. (RT 3012-15 (Follette)).

That the trip generation rate and transfer rate calculations are reasonable estimates for the next 45 years.

The $8.36 per square foot cost calculated by Touche-Ross (Ex. 54) assumes that the trip generation rate calculated by Barton-Aschman from the Recht Hausrath survey is a reasonable estimate of the trip generation rate, which will be in effect for the 45 years covered by the projections. (RT 2078 (Stamm)). That assumption was made on the basis of Barton-Aschman's expert advice that the trip generation rate would remain relatively stable over time. (RT 1309-10 (Firestone)). The downtown EIR (Ex. 14) made certain demographic projections. Barton-Aschman measured the fluctuations in the trip generation rate on the assumption that the downtown EIR demographic projections were correct. They concluded that the linked trip generation rate would fluctuate up and down over time but would stay within the range of between .64 and .60 trips per square foot (RT 3774, 3788, 3794 (Gibson); Ex. 584 at p. 7). Similarly, the ratio of unlinked to linked trips would decline slightly over time from 1.39 to 1.34 trips per square foot. (Ex. 589; RT 4282 (Gibson)). The Board reasonably could have concluded that such changes over time were insignificant. (RT 4245-47 (Firestone); Ex. 592).

Was there a rational basis for the real interest rate forecast in the Touche-Ross report?

Touche-Ross used a price series growth forecast by Professor Gibbons to inflate present costs to their future value and used the Treasurer's earnings rate forecast by Professor Gibbons to discount future costs to present value. (See RT 1147-48 (Cornell); RT 3853 (Gibbons)). The real rate of interest forecast by Professor Gibbons for the next 45 years was approximately 1.7%. (See RT 1110 (Cornell)). This represents the real rate of inter-

est, that is, the amount which the City Treasurer can earn over and above inflation. Professor Gibbons' forecast on real interest rate was the only long-term projection in the record. Plaintiffs' expert, Profesor Cornell, made no projection of the real rate for 45 years and did not testify as to any alternative projection for a shorter term. (RT 1143 (Cornell)). There was considerable evidence in the record questioning the accuracy of the 1.7% forecast which this Court will not detail. The Court concludes that there is a rational basis for the methodology used to forecast the real rate of interest and for the resulting 1.7% forecast relied upon by Touche-Ross and the Board.

Is there a rational basis for making a 45-year projection identifying and measuring the total incremental burdens imposed on the City's Municipal Railway during the peak period by virtue of the demands created by office uses in new development in the downtown area?

TIDF directs that a lump sum be calculated to cover costs which would be incurred by the Muni in providing peak period transit services to meet demands generated by construction of new downtown office space. (TIDF Ordinance Section 38.5). The City has the power to approve or disapprove applications to build new office structures in the new downtown area. If the City wishes to permit development but not to bear increased transit costs, it must know that the fee mechanism will recover the costs that would be incurred over the lifetime of the building. It is not disputed that an office building will stand and will generate transit passengers for 45 years. Accordingly, the 45-year forecast is rationally and directly related to the purposes of the Ordinance. The real question remains as to whether such a forecast, given the many variables including inflationary trends, can be calculated or whether they simply involve playing with numbers and thus, is irrational. Professor Gibbons testified that long-term projections are frequently essential in a

variety of contexts, including the purchase of capital equipment, evaluating long-term bonds, evaluating stocks, funding public and private pension funds and appraising the value of real estate. (RT 3809-12 (Gibbons)). Los Angeles has projected trip generation rates and mode splits 35 years into the future to determine requirements for stations and parking lots for its new billion dollar Metro Rail System. (RT 4343 (Gibson)). Those projections are also being used for calculating a development impact fee. *Id.* MTC has based its $3 billion dollar new Rail Start Program on projections concerning the outlook for Federal Government capital funding through the year 2000. (RT 2358-59 (Dahms); Ex. 15). The San Francisco City Planning Commission is preparing a comprehensive downtown plan based on detailed projections of demographic and transit characteristics of San Francisco through the year 2000. (Ex. 14). Muni itself has projected demands and vehicle needs 20 years into the future to develop the fleet rehabilitation and replacement plan. (Ex. 515; RT 1041 (Stoll)).

The legislative process also routinely incorporates long-term projections: In *J.W. Jones Cos. v. San Diego* (1984) 157 C.A.3d 745, a development fee was upheld against undeveloped property to pay for the costs of future public improvement directly or indirectly generated by development of said property. (See also *Associated Homebuilders, Inc. v. City of Walnut Creek, supra,* p. 637-640; *Norsco Enterprises v. City of Fremont, supra*). The City does not argue that a 45-year projection can be made with 100% confidence. It also follows that long-term projections are inherently less reliable than short-term projections and the uncertainty increases the further out the projection goes. (See RT 3813, 3914 (Gibbons)). The fact remains, however, that one cannot compute a present value without such projections and that such projections are essential and routine in many contexts. The Court concludes that the problems posed by

long-term forecasts are not so great that the forecast cannot be done. Plaintiffs argue, however, that if the transit fee is permissible at all, it must be in the form of an annual extraction, presumably based on a 45-year forecast with the fee being adjusted so as to recover the costs which would be incurred in that year. However, the Court's routinely enter judgments for lump sum amounts. *Niles v. City of San Rafael* (1974) 42 C.A.3d 320; *Rodriquez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 625-62. In any event, there is no testimony in the record from which one could determine that an annual fee would in fact be less onerous to developers than a 40-year lump sum. Of course, if the lump sum is correctly calculated, it will come out exactly equal to the series of annual payments. (RT 3920 Gibbons)). Assuming that the forecast is off with respect to a given year, there will be no way of knowing at the outset whether the lump sum was too high or too low. Thus, the City and developers are equally at risk of the fee being too low on the one hand or too high on the other. An annual fee would not eliminate the inherent uncertainties of long-term projections. It would only shift the burden of making that calculation and the risk of the calculation being too low from the City to the developer. A developer setting out to plan an office project in downtown San Francisco would know that it would be subject to a series of at least 45 annual extractions to support public transit. In making a cost effective analysis, the developer would have to make some judgment with respect to the total liability he would face as a result of those annual payments. This means that the developer would have to take on the burden of performing a projection for 45 years or more in order to determine the likely present value of future annual extractions. (RT 3920-21 (Gibbons)). There is in fact no alternative to making a 45-year projection if the City is to recover the cost which Muni will incur in providing additional transit services to the users of new downtown office space.

The Court concludes that there is a debatable rational basis for making 45-year projections. Further, there is no legal basis for requiring an annual rather than a lump sum extraction.

Touche-Ross calculated the cost per passenger trip and cost per square foot on the basis of data relating to the Municipal Railway Transit System as it actually existed in 1980-81. Touche-Ross then projected that data forward using inflation forecast and discounted the future cost to present value using real interest rate forecasts. This methodology came to be known during the trial as the "snap-shot" methodology because the forecast is based on observations of a specific base year. There is ample support in the record for the "snap-shot" methodology being the only reasonable methodology which could be employed to make long-term projections required here. It is the accepted methodology in setting rates for regulated utilities and has been implemented by the California Legislature and upheld by our Supreme Court. *Pacific Telephone & Telegraph Co. v. Public Utilities Commission* (1965) 62 C2d 634. The "snap-shot" methodology here has been criticized as somehow attempting to predict exactly how the San Francisco Transit System will be operated during the next 45 years with an assumption that the system will have exactly the same configuration and be operated in exactly the same manner for each of the next 45 years. The City contends that Touche-Ross made no such assumption regarding any particular component of the Muni System in the future and concerned itself only with the net costs of developing the relevant unit of service, the passenger trip. The methodology used did in fact recognize that the system would in fact change in the future in ways which could not be accurately predicted and that the system in the year 2025 might well be a different system than existed in 1980-81. However, the Touche-Ross methodology also took into account that there had been significant changes

in the Muni during the past 40 years including fare structure, types of vehicles used, route structures and volume of patronage with none of these changes resulting in the system as a whole becoming more productive. (RT 1452-53, 1747 (Firestone); RT 3977 (Stamm)). The Court concludes that there is a debatable rational basis for the Board of Supervisors accepting the Touche-Ross methodology and the Touche-Ross methodology in all other respects were rationally based.

If the Court were to assume arguendo that the City may not extract a development fee which exceeds the Muni's actual incremental cost, and, assuming further, the elimination of policy driven lines and appropriate adjustment for the transfer rate, then the cost of $8.36 loss per square foot of office space would be reduced only to $7.55. (RT 4810 (Firestone); see also RT 4238-39 (Firestone)).

If fare evasion were taken into account, this adjustment would increase the cost per square foot by $.27. In combination, these two changes would result in the fee falling from $8.36 per square foot to $7.83. (See RT 4810 (Firestone)).

BRUCE BERNHARD ANALYSIS

When the TIDF was enacted, the Board of Supervisors relied upon an analysis of incremental transit costs prepared by Bruce Bernhard. (Ex. 502; see also Ex. 561). Bernhard concluded that the cost of incremental peak period transit services for the next 45 years exceed $5.00 per square foot. The original cost calculation of $9.18 contained certain errors not in dispute and was recalculated at $6.57 per square foot (Ex. 561). The Board in the 1984 amended Ordinance declared that "the principles to be employed in calculating the amount of the fee . . . are wholly consistent with the Board's intention in enacting the Transit Impact Development

Fee Ordinance, with the cost analysis presented to the Board by Bruce Bernhard at the time the Ordinance was enacted . . . which estimate the Board accepts as reasonable . . . ." (Section 4). Bernhard used a trip generation rate of .525 trips per square foot from data received from the San Francisco Department of Planning. (RT 323 (Bernhard)). At that time, it was the best available source of trip generation rate data. (RT 448, 449, 4058 (Bernhard); RT 2512 (Shao)). Two years later, City Planning revised its guidelines and as such, a .307 trips per square foot rate could be derived. As previously indicated, Barton-Aschman derived a trip rate of .64 trips per square foot, substantially higher than the rate used by Bernhard. Accordingly, it was not irrational for Bernhard to have used a .525 trip rate in his original analysis. Bernhard assumed a fast pass usage of 85% for incremental trips. This proved to be too optimistic. However, the Gruen and Gruen survey of what consumers of Muni services would do at different assumed rate structures indicated that under a rate structure such as the one which had been adopted in 1980-1981, the fast pass usage would indeed be 85%. (RT 697-702, 4059-62 (Bernhard); Ex. 23). Accordingly, Bernhard's assumption was not irrational. Bernhard made a simplifying assumption that inflation in the cost of transit would equal the return on the City's investments because he understood those investments would be made conservatively. (RT 332 (Bernhard)). In the context of Bernhard's total methodology he understated and overlooked other costs. That included omitting costs for transfer trips because of the then lack of reliable transfer data. (RT 4065-66 (Bernhard)). He assumed that each new bus would be filled to passenger capacity, where in fact the same is not practical. (RT 4066, 4110 (Bernhard); RT 4413-19 (Geissenheimer)). He used a peak hour trip rate when a peak period trip rate was called for by the Ordinance. (RT 4066-67 (Bernhard)). He did not take into account the problem of fare evasion.

(RT 4067 (Bernhard)) He assumed an average trip rate of 33.5 minutes when in fact the average trip was longer (RT 4067-68 (Bernhard); RT 3249 (Dineen)), thus, understating costs. (RT 3249-50, 3722 (Dineen)). He overstated the incremental cost of part-time labor. (RT 4063 (Bernhard)). And finally, he made an adjustment to the projected LRV costs to take account of possible high costs due to the phasing in of the LRVs and thus, understated costs. (RT 4064-65 (Bernhard); See Ex. 651 at p. 5 and n.4). Were the Bernhard cost calculations revised to discount future costs to present value as used by Touche-Ross and were he to eliminate the LRV adjustment and use of a peak period trip rate—the total marginal costs of Muni trips per square foot of office space during its economic lifetime would be $6.24. This figure is derived by plugging in these corrections into Bernhard's transit fee formula. (See Ex. 109). In determining fees, the sound judgment of informed officials is a sufficient guide to the estimated costs of providing services. *Condit v. Solvang Mun. Improvement District* (1983) 164 C.A.3d 997, 1000. Accordingly, the Court concludes that the Bernhard analysis of costs of incremental peak period transit services for the next 45 years was a sufficient basis for the Board's legislative judgment to impose a fee of $5.00 per square foot on the construction of new office buildings in San Francisco.

PROPOSITION XIIIA

Plaintiffs' specific claim is that the TIDF runs afoul of Article XIIIA, Section 4 of the California Constitution because it is a special tax which has not been adopted by a two-thirds vote. Article XIIIA, Section 4 provides:

> "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except *ad valorem* taxes on real property or a transaction tax

or sales tax on the sale of real property within such city, county or special district."

The California Supreme Court has recently held that the term "special tax" and thus the ambit of Section 4 of Proposition XIII "must be strictly construed and ambiguities therein resolved so as to limit the measure to which Section 4 applies." *City and County v. Farrell* (1982) 32 Cal.3d 47, 52. In fact, no court has ever applied Proposition XIIIA to a development extraction. *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 C.A.3d 317. The payment of a fee as a condition for the privilege of development is not a "special tax" within the meaning of Section 4. *City Council v. South* (1983) 146 C.A.3d 320, 331. The TIDF does not violate State Constitution Article XIIIA.

PROPOSITION XIIIB

Plaintiffs contend that the TIDF seeks to appropriate money for expenditures in excess of the annual amounts permitted to be appropriated by Article XIIIB of the California Constitution.

Nothing in Article XIIIB restricts the power of a municipality to raise revenues, whether by fee or by tax. *City Council v. South* (1983) 146 C.A.3d 320, 333. Article XIIIB is a limitation on government expenditures, not on taxes or other revenues. *County of Placer v. Corin* (1980) 113 C.A.3d 443, 449.

Plaintiffs' contention is without merit.

EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

When there is an equal protection or substantive due process challenge to a legislative classification, such as the TIDF, and neither a suspect class nor a fundamental right is involved the Court must adhere to the rational basis standard articulated previously. That is, the Court

"must presume that the legislation creating the classification is constitutional, and determine only whether the distinctions drawn in the legislation bear some rational relationship to a conceivable legitimate state purpose." *Civil Service Ass'n v. Civil Service Commission* (1983) 139 C.A.3d 449, 456.

The Board of Supervisors has made a determination to impose a portion of the added cost of providing transit service to new downtown buildings upon the developers of those buildings, rather than on all office building owners or on all taxpayers or on all users of public transportation. "There is no constitutional requirement that a regulation must reach every class to which it might be applied; that the legislature must be held rigidly to the choice of regulating all or none." *Norsco Enterprises v. City of Fremont* (1976) 54 C.A.3d 488, 497.

The construction of new office space in downtown San Francisco has in recent years occurred at an explosive rate. In the "Downtown Plan Environment Impact Report," Vol. II, (March, 1984) (Ex. 14C), it has been projected that downtown office space will expand by approximately 22.5 million square feet, as opposed to only 2 million square feet of retail space. Even if retail space were to have a higher peak period trip generation rate the vast majority of the additional peak period passengers would be generated by office buildings. The City could rationally decide to focus its attack on the problem of funding the costs of additional transit facilities on the type of real property development creating the greatest increase in peak period ridership. The TIDF does not violate the equal protection or substantive due process provisions of the Federal or State Constitutions.

PROCEDURAL DUE PROCESS

Plaintiff, CROCKER/PACIFIC GATEWAY claims that the TIDF violates their right of access to the courts. Specifically, Plaintiff argues that since the TIDF requires

payment of the fee in advance, an acknowledgment of liability by the developer would result. This argument is easily dismissed. First, the developers have the option of paying the fee into an escrow account set up by stipulation of the parties. Second, a developer has the opportunity to challenge the fee by writ of mandamus before accepting a permit to build. *McLain Western #1 v. County of San Diego* (1983) 146 C.A.3d 772. Third, even if the mandamus remedy were not available, there would be no deprivation of due process. A person required to pay a fee to a governmental entity is not denied due process even where access to the Courts to challenge the fee is precluded as long as there is an administrative remedy available to hear a complaint concerning the fee. *Payne v. Superior Court* (1976) 17 C.A.3d 908, 914-17. In this case, Plaintiffs have an administrative remedy available to them since Sections 38.8, 38.15 and 38.17 of the Ordinance provide administrative means for developers to appeal fee determinations and collection disputes.

SAN FRANCISCO CITY CHARTER SECTION 3.598

Plaintiffs allege that the TIDF does not comply with Section 3.598 of the City Charter. This section provides that rates for public utilities in San Francisco should be fixed to cover the utilities' operating expenses, that the Board must approve by a two-thirds vote, rates which are inadequate to cover operating expenses, and that any shortfall in rates should be made up by tax levy.

However, the provisions of Section 3.598 do not apply to the TIDF. This charter section specifically excepts the Muni from the requirements of the section. The City Charter section was enacted in 1980, the TIDF in 1981. To hold that the charter section requirements apply to the TIDF would lead to absurd results. Such a result is in conflict with fundamental rules of statutory construction. *Carlton Santee Corp.* v. *Padre Dam Mun. Water Dist.*

(1981) 120 C.A.3d 14, 25. Moreover, even if the charter section did apply, it would not invalidate the TIDF because the Ordinance was enacted by a two-thirds majority called for in Section 3.598.

CONCLUSION

The Court concludes that the TIDF Ordinance is a valid exercise of local Police Power.

Defendant is entitled to its costs of Court. Defendant, CITY, is directed to prepare proposed Judgment in accordance with California Rules of Court.

Upon entry of Judgment in Action No. 780795, the Court will, on proper noticed motion, set for trial, "PACIFIC GATEWAY" and the "CROCKER" consolidated actions, Nos. 789365 and 790661, on the vested rights issue as to whether the TIDF Ordinance may be applied retroactively to property owners who obtained building permits prior to its adoption who were in the course of construction at the time of enactment.

DATED: January 4, 1985

MORTON R. COLVIN
Judge of the Superior Court

APPENDIX F

San Francisco Administrative Code

Chapter 38
Transit Impact Development Fee

Sec. 38.1 *Definitions.*

For the purposes of this Chapter, the following definitions shall apply:

(a) BOARD. The Board of Supervisors of the City and County of San Francisco.

(b) CERTIFICATE OF FINAL COMPLETION AND OCCUPANCY shall mean a certificate of final completion and occupancy issued by the Superintendent, Bureau of Building Inspection, pursuant to the Building Code.

(c) CITY. The City and County of San Franciso.

(d) DOWNTOWN AREA. That portion of the City bounded by Van Ness Avenue as far north as Broadway, from Van Ness Avenue and Broadway easterly on Broadway to Sansome Street, then northerly on Sansome Street to The Embarcadero, then southeasterly on The Embarcadero to Berry Street, then southwesterly on Berry Street to De Haro Street, then southerly on De Haro Street to Alameda Street, then westerly on Alameda Street to Bryant Street, then northerly on Bryant Street to Thirteenth Street, then westerly on Thirteenth Street to South Van Ness Avenue, then northerly to Van Ness Avenue. The downtown area includes all property with an address on any of or within the area surrounded by the above enumerated boundary streets.

(e) GROSS SQUARE FOOT OF OFFICE USE. A square foot of floor space within a structure, whether or not within a room, to be occupied by, or primarily serving, office use.

(f) NEW DEVELOPMENT. Any new construction, addition, extension, *conversion*, or enlargement of an existing structure which includes any gross square feet of office use.

(g) OFFICE USE. Any structure or portion thereof intended for occupancy by business entities which will primarily provide clerical, professional or business services of the business entity, or which will primarily provide clerical, professional or business services to other business entities or to the public, at that location.

(h) PEAK PERIOD. The total number of minutes in an average working day during which the passenger demand on the Municipal Railway system would require it to deploy all its operable equipment so that the system experiences no excess capacity.

(i) PUBLIC TRANSIT SERVICE. Services of the Municipal Railway of the City and County of San Francisco.

Sec. 38.2 *Findings.*

All office uses in the downtown area are benefitted by virtue of the availability of the Municipal Railway as a means of transit for employees and customers.

The demand for public transit service from downtown area office uses imposes a unique burden on the Municipal Railway, qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Municipal Railway during peak periods can be attributed in

substantial part to office uses of property in the downtown area.

New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.

This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.

That level of additional cost incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development. Development of office uses causes more additional Municipal Railway peak-period person-trips, per square foot, than the development of any other use of property in the downtown area. It is desirable to impose the increased burden of serving such use, through a fee approximating the cost per square foot, directly upon the developer of new development generating the need.

Sec. 38.3. *Purposes.*

In order to be able to provide public transit services for new development in the downtown area, the City must

impose a fee. This fee shall be known as the Transit Impact Development Fee.

It is the purpose of this ordinance to require developers of new development in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway both for initial capital outlay for the acquisition of rolling stock and the construction of facilities, and for the long term operation, maintenance and replacement of those facilities once they are in place.

The Transit Impact Development Fee is the most practical and equitable method of financing the construction and operation of required public transit service additions and improvements for the downtown area. This fee is intended to recover all costs incurred by the Municipal Railway in meeting peak-period public transit service demands created by office uses in each new development subject to the fee, including the expansion of service capacity through the purchase of rolling stock, the installation of new lines, the addition to existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.

The rate-making process established by this ordinance is intended to identify and measure the total incremental burdens imposed on the City's Municipal Railway by virtue of the demands created by office uses in new development in the downtown area. Such burdens are to be allocated equitably among new developments in the downtown area subject to the Transit Impact Development Fee. This fee is designed to reflect the benefits conferred on new development because of the added peak-period capacity to carry the passengers generated by office uses in the new developments. Such benefits shall be measured in terms of the costs incurred by the City in expanding and operating the additional capacity in the downtown area required to meet the estimated long-

term peak-period transit service needs of such office use in new development.

The Transit Impact Development Fee shall be collected as a condition for the issuance of a certificate of final completion and occupancy for new development in the downtown area.

This fee will enable the City to pay the capital and operating costs of all additional peak-period public transit services in the downtown area necessitated by office use in new development. The fee schedule shall be reviewed annually and adjusted over time to insure that it continues to reflect the projected cost of providing the additional public transit service required by new developments.

Notwithstanding the basic purposes of this ordinance, the Transit Impact Development Fee shall not exceed five dollars ($5.00) per square foot.

Sec. 38.4. *Imposition of Transit Impact Development Fee.*

Each developer of a new development in the downtown area shall pay to the City and County of San Francisco as a condition precedent to the issuance of a certificate of final completion and occupancy for such new development in the downtown area, a Transit Impact Development Fee. That fee shall be calculated on the basis of the number of gross square feet of office use added by the new development, multiplied by the per-square foot rate in effect (a) on the effective date of this ordinance for new developments for which building permits were issued prior to the effective date hereof, and (b) on the date of the filing of the building permit application as to all other new development. The rates shall be established as a current estimate of the total cost incurred by the City in providing the additional peak-period Municipal Railway transit capacity necessitated by the public transit service needs generated by office uses in the new development over its estimated useful life.

The Central Permit Bureau may not issue a certificate of final completion and occupancy for any new development in the downtown area subject to the fee until it has received evidence of payment of Transit Impact Development Fee (or of the initial installment if installment payment is permitted pursuant to Section 38.4) as set in accordance with Section 38.8 of this chapter.

The Fee imposed by this ordinance shall be payable with respect to (1) all new developments in the downtown area for which building permits are issued on or after the effective date of this ordinance, (2) such new developments in the downtown area for which building permits were issued prior to the effective date of this ordinance where the developers had, in receiving approval by the City Planning Commission, committed themselves to pay a reasonable fee or participate in an assessment district or other financing mechanism designed to enable the City to provide and operate additional peak-period public transit service necessary to accommodate the additional number of peak-period public transit service person-trips generated by office use in the new development, and (3) all other new developments in the downtown area for which building permits were issued prior to the effective date of this ordinance but which had not received a certificate of final completion and occupancy prior to the effective date of this ordinance.

* * * *[1]

As to those new developments for which building permits are issued on or after the effective date of this ordinance, the Transit Impact Development Fee is to be paid on the earliest of the following dates:

(A) the date when fifty percent of the net rentable area of the project has been occupied

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[1] Portions of the ordinance, added by amendment in 1982 (Ordinance No. 275-82), that are not relevant to the issues on appeal have been omitted so that this appendix reflects the ordinance as originally enacted in May 1981.

(B) eight (8) months after the date of issuance of the first temporary permit of occupancy with respect to any office use in the new development; and

(C) the date of issuance of a final certificate of occupancy.

As to those new developments subject to the Transit Impact Development Fee for which building permits have been issued prior to the effective date of this ordinance, the Transit Impact Development Fee shall be due on the effective date of this ordinance unless on that date none of the following has occurred:

(A) the date when fifty percent of the net rentable area of the project has been occupied;

(B) eight (8) months after the date of issuance of the first temporary permit of occupancy with respect to any office use in the new development;

(C) the date of issuance of a final certificate of occupancy; and

(D) the owner or developer has elected to make installment payments.

If none of the foregoing has occurred on the effective date of this ordinance, the Transit Impact Development Fee shall be due when the earliest of the foregoing occurs, except in the case of installment payments.

By electing to defer payment by delivery to the City of a written election acknowledging the obligation therefor, the owner of the new development may obligate itself to pay the fee in monthly installments of interest only, at the rate of one percent (1%) per month, for a period of five (5) years, and thereafter in level monthly payments of principal and interest, at the rate of one percent (1%) per month on the outstanding balance, amortizing over (1) the remaining useful life of the development or (2) thirty (30) years, whichever is the shorter, such pay-

ments to be made on or before the first day of each calendar month during the payment period.

The first monthly installment of the Fee (if monthly installments are to be made) shall be due on the first day of the first calendar month following the date the Fee would otherwise become due and such first payment shall be prorated according to the number of days by which the due date follows the date the Fee would otherwise become due.

Sec. 38.5. *Transit Impact Development Fee Schedule.*

This Transit Impact Development Schedule is set at an actuarially sound level to insure that the proceeds from the Transit Impact Development Fee from each new development will be sufficient, including such earnings as may be derived from investment of the proceeds and amortization thereof, to pay for all capital and operating costs incurred in providing and operating additional required peak-period public transit service capacity, over the life of such new development; without, however, exceeding five dollars ($5.00) per square foot.

The Transit Impact Fee Schedule shall be as follows:

FOR EACH GROSS SQUARE FOOT OF OFFICE USE IN NEW DEVELOPMENT IN THE DOWNTOWN AREA .... $5.00 *

* Formula fee rate calculated at (($5.06)) $9.18; limited to $5.00.

Sec. 38.6. *Adjustments to and Review of the Transit Impact Development Fee Schedule.*

The Transit Impact Development Fee Schedule as set forth in Section 38.5 shall be reviewed annually by the Board, or more often as it may deem necessary, to insure that, subject to the limit of five dollars ($5.00) per square foot, the fee accurately measures the cost of add-

ing, operating, and maintaining the additional peak-periodic public transit service required by office uses in new development in the downtown area.

In determining the number of peak-period person-trips generated annually by office uses in new developments in the downtown area the Board shall obtain a report from the City Planning Commission. Such report shall estimate the number of peak-period person-trips generated annually per gross square foot of office use in new developments.

The Board shall obtain a report from the General Manager of Public Utilities regarding the then-current cost per peak-period Municipal Railway person-trip necessary to provide the expanded public transit services required by new development. The General Manager shall also report the estimated useful life in years of new development, and may recommend different useful-life categories if deemed necessary or desirable to ensure a fair and accurate fee schedule.

The General Manager shall also report the projected annual increases in the cost per peak-period Municipal Railway person-trip necessary to provide the necessary transit services during the estimated useful lives of new developments. Finally, the General Manager shall report the estimated annual rate of return on the proceeds of this fee which would be invested prior to their use to provide the necessary additional transit services during the useful lives of new developments.

After receiving these reports and making them available for public distribution, the Board of Supervisors shall conduct a public hearing in which it shall consider these reports, hear testimony from any interested members of the public and receive such other evidence as it may deem necessary. At the conclusion of that hearing the Board shall determine the number of peak-period person-trips of the Municipal Railway generated annually

per gross square foot of office use in new development. The Board shall also determine whether differing categories of useful lives expressed in years should be used to ensure a fair and accurate fee schedule, and if so what the different categories should be. The Board shall then determine the current cost per peak-period Municipal Railway person-trip for the additional peak-period service necessary to serve new developments. The Board shall also determine the appropriate annual rate of increase of the cost of providing additional peak-period Municipal Railway person-trips and the appropriate annual rate of return on the invested proceeds of this fee.

The Board shall then establish a Transit Impact Development Fee Schedule expressed in terms of a sum per gross square foot for office use in new developments using the general formula: annual peak-period Municipal Railway person-trips per gross square foot times current cost per additional peak-period Municipal Railway person-trip times the present value factor appropriate to the difference between the annual rate of cost increases and return on invested funds over the useful lives of new developments, establishing as many separate rates as are deemed appropriate to the determinations of useful life categories.

The rates of the fee schedule shall be set at an actuarially sound level to insure that the proceeds will be sufficient to pay for all capital and operating costs incurred in providing and operating additional required peak-period capacity, including such earnings as may be derived from investment of the proceeds and amortization thereof, over the life of such new developments; provided, however, that said sum may not, for any category of useful life, exceed five dollars ($5.00) per square foot.

In the event that the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the

cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee has been fully paid shall annually receive a credit, up to the total amount of such fees or "assessments, of that portion of the prorated annual amount of the Transit Impact Development Fee equal to those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee." The prorated annual amount of the Transit Impact Development Fee is obtained by dividing the total Transit Impact Development Fee already paid by the estimated useful life of the development, in years.

The portion credited against such fees or assessments shall be determined by comparing those costs included in the Transit Impact Development Fee and those included in such fees or assessments.

In the event that the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee is being paid in installments shall annually receive a credit, up to the total amount of such fees or assessments, for that portion of such annual installment, whether interest only or principal and interest, equal to those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee.

In the event the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee will be due but has not been paid shall receive a credit against the development fee otherwise

due in an amount equal to that portion of the transit impact development fee equal to the value of those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee.

Sec. 38.7. *Use of Proceeds from Transit Impact Development Fee.*

The sums derived from the collection of the Transit Impact Development Fee shall be held in trust by the Treasurer of the City and shall be distributed according to the fiscal and budgetary provisions of the San Francisco Charter subject only to the following conditions and limitations. The proceeds from the Transit Impact Development Fee including earnings from investments thereof may be used only for the provision of peak-period public transit service over and above public transit service being provided on March 1, 1980, to and from and within the downtown area, to compensate for and to defray the capital and operating costs incurred by the City in providing the benefit of public transit service in the downtown area in order to meet the special peak-period burden placed on the City by the addition of new office use in new developments in the downtown area of the City.

In the event a structure for which this Transit Impact Development Fee has been fully paid is demolished or converted to non-office use prior to the expiration of its estimated useful life, the City shall refund to the owner a portion of the amount of the fee determined by deducting an amount reflecting the duration of the office use in relation to the useful life estimate used in determining the Transit Impact Development Fee for that structure. In the event a structure for which the Transit Impact Development Fee is being paid in installments is demolished or converted to non-office use prior to the final payment, installments shall continue only until the prin-

cipal obligation is reduced to the amount which would have been refunded if the Transit Impact Development Fee had been fully paid. In the event a building permit expires prior to completion of the work and commencement of occupancy, so that it will be necessary to obtain a new permit to carry out new development, the obligation to pay the fee shall be cancelled, and any amount previously paid shall be refunded.

Sec. 38.8. *Setting of Fee.*

Each developer, prior to obtaining a building permit for any new development in the downtown area after the effective date of this ordinance, shall file with the General Manager of the Public Utilities Commission, on such forums as he may develop, a report indicating the number of gross square feet of the new development intended for office use. Each developer of a new development for which a building permit was issued prior to the effective date of this ordinance and for which a final certificate of occupancy had not been issued prior to the effective date of this ordinance shall file the same report prior to obtaining a final certificate of occupancy. The General Manager shall determine the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, crediting the number of gross square feet of office use being eliminated as part of the project and disregarding the number of gross square feet of office use being retained determine the useful life category if the Fee Schedule includes useful life categories, apply the fee schedule, and determine the fee which reflects the additional cost of peak-period public transit service generated by the office use in the new development.

The applicant shall be notified of the General Manager's determination in writing. The General Manager shall mail a copy of his determination to the applicant.

The applicant may appeal the determination of the number of gross square feet of office use subject to the fee, or the useful-life category if the fee schedule includes useful life categories, to the Public Utilities Commission in order to reduce the amount of the fee obligation. If the applicant notifies the General Manager of his acceptance of the determination, or does not appeal to the Public Utilities Commission within 15 days of the date of personal service or mailing of notice of the General Manager's determination, the General Manager's determination shall be final, and a notice of such determination shall be provided the Central Permit Bureau.

The Central Permit Bureau may not issue a building permit for any new development in the downtown area until it has received notice from the General Manager of the Public Utilities Commission or the Public Utilities Commission of the final determination of the amount of the Transit Impact Development Fee to be paid.

Sec. 38.9. *Rules and Regulations.*

The Public Commission is empowered to adopt such rules, regulations, and administrative procedures as it deems necessary to implement this chapter, including the determination, collection, refund, and utilization of the proceeds, of the Transit Impact Development Fee.

Sec. 38.10. *Non-payment; Additional Request.*

Where installment payment of the Transit Impact Development Fee has been initiated pursuant to Section 38.4 and any installment of the fee is not paid within sixty (60) days following the date fixed for payment of the installment, the Public Utilities Commission shall personally serve or mail to the owner of the new development for which said Transit Impact Development Fee is unpaid a request for payment.

The written request shall advise the owner that if he fails to pay the amount due, the General Manager in a noticed public hearing will add to the fee installment a 10% penalty and that a lien for the entire unpaid balance, including penalty on the installment, and with interest accruing on the entire unpaid balance, will be recorded against the real property to which the public transit service is rendered.

Sec. 38.11. *Lien Proceedings; Notice.*

If payment of the installment is not received within thirty (30) days following mailing of the additional request, the General Manager of the Public Utilities Commission shall initiate proceedings, by reporting the delinquency to the Board, to make the entire unpaid balance of the Transit Impact Development Fee, including penalty on the unpaid installment, a special assessment lien against the property served. Such charges against delinquent accounts shall be reported to the Board at least once each year. Said report for each such delinquent account shall contain the owner's name, the amount due, including penalty, the amount of the unpaid balance, including penalty on the delinquent installment, and a description of the parcel served. The General Manager of the Public Utilities Commission shall also indicate which of such delinquent accounts should be exempted from the lien procedure because of the small amounts involved, or because another debt collection procedure is more appropriate. The descriptions of the parcels shall be those used for the same parcels on the Assessor's map books for the current year. Upon receipt of such report the Board shall fix a time, date and place for hearing the report and any protest or objections thereto, and shall cause notice of the hearing to be mailed to each owner of the parcels of real property described in the report not less than ten (10) days prior to the date of hearing.

Sec. 38.12. *Hearing.*

At the time fixed for consideration of the report the Board shall hear it with any objections of the owners of the parcels liable to be assessed for delinquent accounts. The Board may make such revisions, corrections or modifications of the report as it may deem just; and in the event that the Board is satisfied with the correctness of the report (as submitted or as revised, corrected or modified), it shall be confirmed. The decision of the Board on the report and on all protests or objections thereto shall be final and conclusive; provided, however, any delinquent account may be removed from the report by payment in full at any time prior to confirmation of the report. The Clerk of the Board shall cause the confirmed report to be verified in form sufficient to meet recording requirements.

Sec. 38.13. *Collection of Assessment.*

Upon confirmation of the report by the Board, the delinquent charges contained therein shall constitute a special assessment against the parcels to which the services were rendered.

Each such assessment shall be subordinate to all existing special assessment liens previously imposed upon such parcels and paramount to all other liens except those for state, county and municipal taxes with which it shall be upon parity. The lien shall continue until the assessment and all interest and penalties due and payable thereon are paid. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to said special assessment.

Sec. 38.14. *Recordation; Charges.*

The Clerk of the Board shall cause the confirmed and verified report to be recorded in the County Recorder's office and the special assessment lien on each parcel of property described in said report shall carry additional

charges for administrative expenses of fifty dollars ($50.00) or ten percent (10%) of the amount of the unpaid balance, including penalty, whichever is higher, and a rate of one and one-half percent (1½%) per full month compounded monthly from the date of the recordation of the lien on all charges due.

Sec. 38.15. *Filing with Controller and Tax Collector; Distribution of Proceeds.*

The Clerk of the Board shall file a certified copy of each confirmed report with the Controller and Tax Collector within ten (10) days after confirmation of the report, whereupon it shall be the duty of said officers to add the amount of said assessment to the next regular bill for taxes levied against said parcel or parcels of land for municipal purposes, and thereafter said amount shall be collected at the same time and in the same manner as City and County taxes are collected, and shall be subject to the same procedure under foreclosure and sale in case of delinquency as provided for property taxes of the City and County of San Francisco.

Except for the release of lien recording fee authorized in Section 38.16, all sums collected by the Tax Collector pursuant to this ordinance shall be held in trust by the Treasurer and distributed as provided in Section 38.6 of this Chapter.

Sec. 38.16. *Release of Lien, Recording Fee.*

On payment to the Tax Collector of the special assessment, the Tax Collector shall cause to be recorded a Release of Lien with the County Recorder, and from the sum collected pursuant to Section 38.15, shall pay to the County Recorder a recording fee of Six Dollars ($6.00).

Sec. 38.17. *Manner of Giving Notices.*

Any notice required to be given hereunder by the Board or the Public Utilities Commission to an owner shall be

sufficiently given or served upon the owner for all purposes hereunder if personally served upon the owner or if deposited, postage prepaid, in a post office letter box addressed in the name of the owner at the official address of the owner maintained by the Tax Collector of City for the mailing of tax bills or, if no such address is available, to the owner at the address of the real property to which the public transit service was provided.

Sec. 38.18. *Severability.*

The provisions of this Ordinance shall not apply to any person, association, corporation or to any property as to whom or which it is beyond the power of the City and County of San Francisco to impose the fee herein provided. If any sentence, clause, section or part of this Ordinance, or any fee imposed upon any person or entity is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality, or invalidity shall affect only such clause, sentence, section or part of this ordinance, or person or entity, and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this Ordinance, or its effect on other persons or entities. It is hereby declared to be the intention of the Board of Supervisors of the City that this Ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part of this Ordinance not been included herein, or had such person or entity been expressly exempted from the application of this Ordinance. To this end the provisions of this ordinance are severable.

APPENDIX G

AMENDMENT OF THE WHOLE
As Amended in Bd. 5/4/84

FILE NO. 199-84-1

ORDINANCE NO. 224-84

(TIDF)

AMENDING CHAPTER 38 OF THE SAN FRANCISCO ADMINISTRATIVE CODE BY AMENDING SECTIONS 38.1, 38.2, 38.5 AND 38.8 THEREOF AND BY ADDING SECTION 38.8.5 THERETO RELATING TO THE PRINCIPLES TO BE USED IN CALCULATING THE AMOUNT OF THE TRANSIT IMPACT DEVELOPMENT FEE AND PROVIDING FOR ADJUSTMENT TO THE TRANSIT IMPACT DEVELOPMENT FEE IN CASES OF CONVERSION FROM OTHER USES TO OFFICE USE TO INCORPORATE THE TRIP GENERATION RATE OF PRIOR USE SO AS TO ACCURATELY MEASURE THE INCREMENTAL IMPACT OF THE CONVERSION TO OFFICE USE ON THE SAN FRANCISCO MUNICIPAL RAILWAY.

NOTE: Additions or substitutions are underlined; deletions are indicated by ((double parentheses)).

Be it ordained by the people of the City and County of San Francisco:

Section 1. Section 38.1, 38.2 and 38.5 of Chapter 38, the San Francisco Administrative Code, are hereby amended to read as follows:

Section 38.1. *Definitions.*

For the purposes of this chapter, the following definitions shall apply:

(a) BOARD. The Board of Supervisors of the City and County of San Francisco.

(b) CERTIFICATE OF FINAL COMPLETION AND OCCUPANY shall mean a certificate of final completion and occupancy issued by the Superintendent, Bureau of Building Inspection, pursuant to the Building Code.

(c) CITY. The City and County of San Francisco.

(d) DOWNTOWN AREA. That portion of the City and County bounded by Van Ness Avenue as far north as Broadway, from Van Ness Avenue and Broadway easterly on Broadway to Sansome Street; then northerly on Sansome Street to the Embarcadero; then southeasterly on the Embarcadero to Berry Street; then southwesterly on Berry Street to De Haro Street; then southerly on De Haro Street to Alameda Street; then westerly on Alameda Street to Bryant Street; then northerly on Bryant Street to Thirteenth Street; then westerly on Thirteenth Street to South Van Ness Avenue; then northerly to Van Ness Avenue. The downtown area includes all property with an address on any of or within the area surrounded by the above enumerated boundary streets.

(e) GROSS SQUARE FOOT OF OFFICE USE. A square foot of floor space within a structure, whether or not within a room, to be occupied by, or primarily serving, office use.

(f) NEW DEVELOPMENT. Any new construction, addition, extension, conversion, or enlargement of an existing structure which includes any gross square feet of office use.

(g) OFFICE USE. Any structure or portion thereof intended for occupancy by business entities which will primarily provide clerical, professional or business services of the business entity, or which will primarily provide clerical, professional or business services to other business entities or to the public, at that location.

(h) PEAK PERIOD. The total number of minutes in an average working day, determined in accordance with Section 38.5(a), during which ((the passenger demand on)) the Municipal Railway ((system would require it to deploy)) deploys all its operable equipment so that the system experiences no excess vehicular capacity.

(i) PUBLIC TRANSIT SERVICE. Services of the Municipal Railway of the City and County of San Francisco.

Section 38.2. *Findings.*

All office uses in the downtown area are benefitted by virtue of the availability of the Municipal Railway as a means of transit for employees and customers.

The demand for public transit service from downtown area office uses imposes a unique burden on the Municipal Railway, qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Municipal Railway during peak periods can be attributed in substantial part to office uses of property in the downtown area.

New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.

This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.

That level of additional cost incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development. Development of office uses causes more additional Municipal Railway peak-period person-trips, per square foot, than the development of any other use of property in the downtown area. It is desirable to impose the increased burden of serving such use, through a fee approximating the cost per square foot, directly upon the developer of new development generating the need.

Even though other uses such as retail use also generate Municipal Railway peak-period person trips (and even if a particular alternate use were to generate more such trips than do office uses), the Board refrains from imposing the Transit Impact Development Fee on such uses at this time, and in that regard finds: (1) The vast majority of new commercial space in the downtown area will be devoted to office uses, and the primary cause for new peak-period Municipal Railway passengers will be the development of new office uses; and (2) a significant proportion of the new retail and service uses which will hereafter be developed in the downtown area will be constructed in connection with new office developments and, for that reason, limitation of the Fee to office uses both ameliorates the economic impact of the Fee on developers of office space and encourages the development of projects with mixed uses consisting of office, retail and service uses.

Sec. 38.5. *Transit Impact Development Fee Schedule.*

This Transit Impact Development Fee Schedule is set at an actuarially sound level to insure that the proceeds from the Transit Impact Development Fee from each new development is sufficient, including such earnings as may be derived from investment of all proceeds and amortization thereof, to pay for all capital and operating costs incurred in providing and operating additional required peak-period public transit service capacity, over the life of such new development; without, however, exceeding five dollars ($5.00) per square foot.

The following principles have been and, in the future, shall be observed in calculating the amount of the Fee:

(a) The times during the day which constitute the peak period shall be determined functionally as that period of time during which a decision to add additional scheduled vehicle runs would require Muni to purchase or lease additional vehicles because the existing available fleet is fully committed in the sense that vehicles are actually in revenue service, being held for deployment later in the peak period, in reserve, or scheduled for repair or preventive maintenance.

(b) State, federal and private operating and capital subsidies for the cost of providing additional peak period service shall be assumed only when and to the extent that receipt of such subsidies is reasonably probable.

(c) The calculation of future costs of providing service for additional passengers during the peak periods should assume no increase in the level of crowding for the system as a whole or material decreases in the frequency of service.

(d) The cost of electricity shall be calculated based on the price which the City could receive for such power were it sold to PG&E assigned customers rather than the cost at which it is furnished to the Municipal Railway by the Hetch Hetchy Water and Power Department.

(e) Costs and revenue attributable to trips taken outside the peak periods by office workers and visitors shall not be included.

(f) In calculating the revenue from additional peak period trips, a weighted average fare (reflecting the frequency of trips paid for by cash fares as opposed to fast passes) shall be estimated. In making this calculation, the average fare for a fast pass trip shall be determined by dividing the cost of a fast pass by an estimate of the total number of trips per month (whether or not taken in the peak period) which will be taken by a fast pass purchaser. In projecting future revenues, peak period revenue shall be assumed to increase at the same rate as peak period operating costs.

(g) Where feasible, actual information for the fiscal year for which the fee is being calculated should be used. Where estimates must be made, those estimates should be based on such information as the General Manager of the Public Utilities Commission or his delegate considers reasonable for the purpose. Possible changes in the operation or productivity of the Municipal Railway shall be taken into account only if such changes are the announced policy of the Municipal Railway or the Public Utilities Commission and the impact of such change on peak period costs or revenues can be estimated with reasonable certainty.

The Transit Impact Fee Schedule shall be as follows:

FOR EACH GROSS SQUARE FOOT OF OFFICE USE IN NEW DEVELOPMENT IN THE DOWNTOWN AREA .... $5.00 *

* Formula fee rate calculated ((at $9.18)) to be in excess of $5.00; limited to $5.00.

Section 2. Section 38.8 of Chapter 38 of the San Francisco Administrative Code is hereby amended to read as follows:

Section 38.8. *Setting of Fee.*

Each developer, prior to obtaining a building permit for any new development in the downtown area after the effective date of this ordinance, shall file with the General Manager of the Public Utilities Commission, on such form as he may develop, a report indicating the number of gross square feet of the new development intended for office use. Each developer of a new development for which a building permit was issued prior to the effective date of this ordinance and for which a final certificate of occupancy had not been issued prior to the effective date of this ordinance shall file the same report prior to obtaining a final certificate of occupancy. The General Manager shall determine the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, ((crediting the number of gross square feet of office use being eliminated as part of the project and)) disregarding the number of gross square feet of office use being retained, determine the useful life category if the Fee Schedule includes useful life categories, apply the fee schedule, and determine the fee which reflects the additional cost of peak-period public transit service generated by the office use in the new development. The applicant shall be notified of the General Manager's determination in writing. The General

Manager shall mail a copy of his determination to the applicant. The applicant may appeal the determination of the number of gross square feet of office use subject to the fee, the adjustment factor described in Section 38.8.5(b), or the useful-life category if the fee schedule includes useful life categories, to the Public Utilities Commission in order to reduce the amount of the fee obligation. If the applicant notifies the General Manager of his acceptance of the determination, or does not appeal to the Public Utilities Commission within 15 days of the date of personal service or mailing of notice of the General Manager's determination, the General Manager's determination shall be final, and a notice of such determination shall be provided the Central Permit Bureau. The Central Permit Bureau may not issue a building permit for any new development in the downtown area until it has received notice from the General Manager of the Public Utilities Commission or the Public Utilities Commission of the final determination of the amount of the Transit Impact Development Fee to be paid.

Section 3. Chapter 38 of the San Francisco Administrative Code is hereby amended by adding Section 38.8.5 thereto, reading as follows:

Section 38.8.5. Credits for Prior Use.

In determining the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, the General Manager shall provide for the following credits:

a. For prior office uses, there shall be a credit for the number of gross square feet of office use being eliminated as part of the project.

b. For prior uses other than office use, there shall be a credit for the number of gross square feet of non-office use being eliminated multiplied by an adjustment factor

to reflect the difference between office building peak period municipal railway trip generation rates and peak period municipal railway trip generation rates for other uses. The adjustment factor shall be determined by the General Manager as follows:

(1) The adjustment factor shall be a fraction, the numerator of which shall be the peak period municipal railway trip generation rate which the General Manager shall determine, in consultation with the Department of City Planning applies to the class of prior use being eliminated by the project.

(2) The denominator of the fraction shall be the peak period municipal railway trip generation rate for office use used in the most recent calculation of the Transit Impact Development Fee Schedule approved by the Board of Supervisors.

(3) Not withstanding the foregoing, the adjustment factor shall not exceed 1.

Section 4. The Board finds and declares that the principles to be employed in calculating the amount of the fee as set forth in Section 1 above are wholly consistent with the Board's intention in enacting the Transit Impact Development Fee Ordinance, with the cost analysis presented to the Board by Bruce Bernhard at the time the ordinance was enacted (which, after correction of certain errors, estimated the loss per square foot to be $6.57, which estimate the Board accepts as reasonable), with the Transit Impact Development Fee Cost Studies for fiscal years 1980-81 and 1981-82 approved by the Board by Resolution 880-83, and with the revised Transit Impact Development Fee Cost Study prepared by Touche Ross & Co. dated February 22, 1984 making certain revisions to the estimation of the FY 1980-81 net present

value of the loss which would be incurred in providing additional peak-period transit service (resulting in a net reduction of said loss from $8.60 to $8.36 per square foot). The Board hereby approves the assumptions, methodology and conclusions stated in said revised Transit Impact Development Fee Cost Study. The Board accordingly finds that as of the date the Ordinance was enacted, and at all times thereafter, the net present value of the loss which would be incurred in providing additional peak period transit service was in excess of $5.00 per square foot.

Section 5. The Board of Supervisors intends that the portion of the amendment to Chapter 38 adding Section 38.8.5 be given full retroactive effect so that the credits allowed by Section 38.8.5 shall be afforded to all developers who have paid the fee or will hereafter be required to do so.

Section 6. The amendments to Chapter 38 set forth in Sections 2 and 3 of this ordinance shall not be effective unless and until, prior to June 25, 1984, the City Attorney has advised the Clerk of the Board that either (1) the Superior Court for the County of San Francisco has entered an order approving a partial settlement of Russ Building Partnership, et al. v. City and County of San Francisco, No. 780-795, providing that no claims for costs, attorney's fees or expenses be sought by the class action plaintiff therein on account of the adoption of Section 2 and 3 of this ordinance; or, alternatively, (2) that the Superior Court has determined that no such court order approving such partial settlement is required by law.

APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. 000156

Court of Appeal First Appellate District
No. A030997 and No. A033493

Superior Court of the City and County of San Francisco
No. 780795, No. 789365, and No. 790661

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE, a general partnership, CROCKER NATIONAL BANK, a national banking association, and CROCKER PROPERTIES, INC., a corporation,

Respondents,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Petitioner.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Pacific Gateway Associates Joint Venture, Crocker National Bank and Crocker Properties, Inc., the Respondents above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California entered in this action on March 17, 1988.

The appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 24, 1988

JAMES P. BENNETT
LEIGH R. SHIELDS
MORRISON & FOERSTER

By /s/ James P. Bennett
JAMES P. BENNETT
Attorneys for Respondents